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A COMPENDIUM
OF
SHERIFF LAW,

ESPECIALLY IN RELATION TO

WRITS OF EXECUTION.

BY
PHILIP E. MATHER,
SOLICITOR AND NOTARY,
FORMERLY UNDER-SHERIFF OF NEWCASTLE-UPON-TYNE.

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TO

The Honourable Sir GAINSFORD BRUCE, D.C.L.,

ONE OF THE JUDGES OF THE QUEEN'S BENCH DIVISION OF
HER MAJESTY'S HIGH COURT OF JUSTICE,

This Work

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PREFACE.



IN preparing this Book I have aimed at supplying a good practical work both for under-sheriffs and the legal profession generally, especially with regard to the relative rights and duties of litigants, the sheriff and third parties in case of Execution. I have accordingly omitted matter of mere historical interest and minimized reference to more or less obsolete procedure. This Work, moreover, purports to be a Compendium of Sheriff Law rather than a Treatise on the subject, the former apparently being a more useful form.

Full information will be found in the opening chapters as to the appointment, qualification, precedence and dress of the sheriff, the appointment of the under-sheriff and other officers, with special reference to the office of Secondary of the City of London, and also the duties of the sheriff on the expiration of his term of office.

Whilst I have dealt individually with all the various Writs of Execution, special prominence has

been given to the most frequent writ, *Fieri Facias*, in connection with which I have treated of information regarding matters more or less applicable to Writs of Execution generally. Four important subjects connected with Execution, viz.:—Companies, Husbandry Provisions, Fixtures, and Married Women's Property—have been discussed in their relation to Execution; and the fullest information has been given with regard to the subjects of, and procedure in, those adverse claims with which the sheriff is frequently confronted in Execution, viz.:—Landlord's Claim for Rent, Bills of Sale and Bankruptcy (including Arrangements with Creditors and Voluntary and Fraudulent Dispositions of Property), prominence being given to the important subject of Bills of Sale. The sheriff's relief by way of Interpleader has also been dealt with at length.

Of special interest and service to sheriffs and under-sheriffs will be found those chapters which treat especially of their duties in connection with Assizes and Sessions, Criminal Execution, and the Assessment of Damages and Compensation. The concluding chapters are devoted to the subjects of the Liability and Rights of and Remedies against the Sheriff, and the Sheriff's Fees and Accounts.

It was originally intended to deal with the sheriff's position at Parliamentary Elections, but his

duties as returning officer being so fully treated in standard works on Parliamentary Election Law, I ultimately decided to avoid unnecessarily lengthening this Work by setting out that branch of the sheriff's duties.

With a view to convenience of reference, I have, as far as possible, inserted the applicable forms and set out the titles of cases, statutes, and other authorities in the body of the Work, whilst I have reproduced in a separate chapter those Rules of the Supreme Court, 1883, and the Crown Office, 1886, which especially bear upon the subject of this Book.

For valuable help in compiling this Work my cordial thanks are due to Messrs. F. J. Greenwell, Edgar Meynell, C. Johnston Edwards, and J. M. Bailey, Barristers-at-Law, to the Under-sheriffs of the counties of London, Essex, Oxford, York, Durham and Northumberland, to the Secondary of the City of London, and to Mr. Robert Holtby, Deputy Clerk of Assize and Clerk of Arraignment, North-Eastern Circuit. I am also indebted to Mr. Hugh Morrison Rose, Barrister-at-Law of the Middle Temple, for the preparation of the General Index and Tables of Cases and Statutes, and for other valuable assistance. I have been careful to prominently indicate all quotations, especially in view of

my Work purporting to be a Compendium. Moreover, any substantial quotations from modern textbooks are made with the sanction of the authors, and I take this opportunity of specially acknowledging my obligation to them in this respect.

PHILIP E. MATHER.

NEWCASTLE-UPON-TYNE.

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Ad. & E.	Adolphus and Ellis's Reports.
Amb.	Ambler's Reports.
Anst.	Anstruther's Reports.
A. C. (preceded by [1891], [1892], &c. as the year may be).	Law Reports, Appeal Cases.
App. Cas.	Law Reports, Appeal Cases.
Atk. Sh.	Atkinson on Sheriffs.
Atk.	Atkyn's Reports.
B. & A.	Barnewall and Alderson's Reports.
B. & Ad.	Barnewall and Adolphus's Reports.
B. & B.	Broderip and Bingham's Reports.
B. & C.	Barnewall and Cresswell's Reports.
B. C. R.	Bail Court Reports, Saunders and Cole.
B. & S.	Best and Smith's Reports.
Bac. Abr.	Bacon's Abridgment.
Barn.	Barnardiston's King's Bench Reports.
Batt.	Batty's Reports (Ireland).
Beav.	Beavan's Reports.
Bing.	Bingham's Reports.
Bing. N. C.	Bingham's New Cases.
Bl. H.	Blackstone's (Henry) Reports.
Bl. W.	Blackstone's (William) Reports.
Blac. Com.	Blackstone's Commentaries.
Bli.	Bligh's Reports.
Bli. N. S.	Bligh's Reports, New Series.
Bos. & Pul.	Bosanquet and Puller's Reports.
Bro. Abr.	Brooke's Abridgment.
Bro. C. C.	Browne's Chancery Reports.
Brod. & B.	Broderip and Bingham's Reports.
Burr.	Burrow's Reports.
C. B.	Common Bench Reports, or Manning, Granger and Scott's Reports.
C. B., N. S.	Common Bench Reports, New Series.
C. C.	Cases in Chancery or Crown Cases.
C. & E.	Cababe and Ellis's Reports.
C. & J.	Crompton and Jervis's Reports.
C. & K.	Carrington and Kirwan's Reports.
C. & M.	Crompton and Meeson's Reports.
C. M. & R.	Crompton, Meeson and Roscoe's Reports.
C. P. D.	Law Reports, Common Pleas Division.
C. & P.	Carrington and Payne's Reports.
C. of S. Ca., 4th Series..	Court of Session Cases, 4th Ser. (by Rettie and others).
Camp.	Campbell's Reports.
Car. & M.	Carrington and Marshman's Reports.
Ch. (preceded by [1891], [1892], &c. as the year may be).	Law Reports, Chancery Division.
Ch. D.	Law Reports, Chancery Division.

Chit.	Chitty's Reports.
Chit. Arch.	Chitty's Archbold's Practice.
Chit. Forms	Chitty's Forms.
Cl. & F.	Clark and Fennelly's Reports.
Co.	Coke's Reports.
Co. Litt.	Coke on Littleton.
Coll. C. R.	Collyer's Chancery Reports.
Com. Dig.	Comyns's Digest.
Coop. temp. Brough. ..	Cooper's (C. P.) Cases time of Brougham.
Cowp.	Cowper's Reports.
Cro. Eliz.	Croke's Reports, time of Elizabeth.
Cro. Car.	Croke's Reports, time of Charles.
D. & L.	Dowling and Lowndes' Practice Cases.
D. & M.	Davison and Merivale's Reports.
D. & R.	Dowling and Ryland's Reports.
Dalt. Sh.	Dalton on Sheriffs.
De G. & J.	De Gex and Jones's Reports.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports.
Doug.	Douglas' Reports.
Dow & Cl.	Dow and Clark's Cases.
Dowl. P. C. or D. P. C.	Dowling's Practice Reports.
Dowl. N. S. or D. N. S.	Dowling's Practice Reports, New Series.
Drew.	Drewry's Reports.
Durn. & E. or T. R. ..	Durnford and East, or Term Reports.
Dy.	Dyer's Reports.
East	East's Reports.
El. & E.	Ellis and Ellis's Reports.
Eq. Cas. Abr.	Equity Cases Abridged.
Esp.	Espinasse's Reports.
Ex.	Welsby, Hurlstone and Gordon's Reports.
Ex. D.	Law Reports, Exchequer Division.
F. & F.	Foster and Finlason's Reports.
For.	Forrest's Reports.
G. & D.	Gale and Davison's Reports.
Gale	Gale's Exchequer Reports.
Giff.	Giffard's Reports.
Gilb. Ex.	Gilbert's Executions.
H. & C.	Hurlstone and Coltman's Reports.
H. & N.	Hurlstone and Norman's Reports.
H. & W.	Harrison and Wollaston's Reports.
H. L. Cas.	Clark's House of Lords' Cases.
Hard.	Hardres' Reports.
Hare	Hare's Reports.
Hodg.	Hodges' Reports.
Holt	Holt's (Sir John) Reports.
Ir. C. L.	Irish Common Law Reports.
Ir. Ch.	Irish Chancery Reports.
J. P.	Justice of the Peace.
Jac.	Jacob's Reports.
Jon.	Jones' Reports (Ireland).
Jones, W.	Jones' (Sir William) Reports.
Jur.	Jurist Reports.
Jur. N. S.	Jurist, New Series.
Kay & J.	Kay and Johnson's Reports.
Keb.	Kemble's Reports.

TABLE OF ABBREVIATIONS.

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L. J. Bk.	Law Journal, Bankruptcy.
L. J., C. P.	Law Journal, Common Pleas.
L. J., Ch.	Law Journal, Chancery.
L. J., Ex.	Law Journal, Exchequer.
L. J., M. C.	Law Journal, Magistrates' Cases.
L. J., Q. B.	Law Journal, Queen's Bench.
L. J., P. C.	Law Journal, Privy Council.
L. M. & P.	Lowndes, Maxwell, and Pollock's Reports.
L. R., C. C.	Law Reports, Crown Cases Reserved.
L. R., C. P.	Law Reports, Common Pleas.
L. R., Ch.	Law Reports, Chancery.
L. R., Eq.	Law Reports, Equity.
L. R., Ex.	Law Reports, Exchequer.
L. R., H. L.	Law Reports, House of Lords.
L. R. I.	Law Reports (Ireland).
L. R., P. C.	Law Reports, Privy Council.
L. T.	Law Times.
Latch.	Latch's Reports.
Leg. O.	Legal Observer.
Leon.	Leonard's Reports.
Ld. Ken.	Kenyon's Reports.
Ld. Raym.	Lord Raymond's Reports.
Lind.	Lindley on Companies.
M. B. R.	Morrell's Bankruptcy Reports.
M. D. & De G.	Montagu, Deacon and De Gex's Reports.
M. & G.	Manning and Granger's Reports.
M. & M.	Moody and Malkin's Reports.
M. & R.	Manning and Ryland's Reports.
M. & S.	Maule and Selwyn's Reports.
M. & Scott	Moore and Scott's Reports.
M. & W.	Meeson and Welsby's Reports.
Macq. H. L. Cas.	Macqueen's Scotch Appeals.
M'Cle. & Y.	M'Cleland and Young's Reports.
Marsh.	Marshall's Reports.
Meg.	Megone's Cases under Companies Acts.
Mod. Rep.	Modern Reports.
Moo. P. C. C.	Moore's Privy Council Cases.
Moo. & R. or M. & Rob.	Moody and Robinson's Reports.
Moore (C. P.)	Moore's Common Pleas Reports.
N. & M.	Neville and Manning's Reports.
N. & P.	Neville and Perry's Reports.
N. R.	New Reports, by Bosanquet and Puller.
P. & D.	Perry and Davison's Reports.
P. Wms.	Peere Williams' Reports.
Pal.	Palmer's Reports.
Par.	Parker's Reports.
Pea.	Peake's Reports.
Ph.	Phillip's Reports.
Price	Price's Reports.
Q. B.	Adolphus and Ellis, Queen's Bench Reports, New Series.
Q. B. (preceded by [1891], [1892], &c., as the year may be) ..	Law Reports, Queen's Bench Division.
Q. B. D.	Law Reports, Queen's Bench Division.
R. & M.	Ryan and Moody's Reports.
R. R.	Revised Reports.
Rail. Cas.	Railway Cases by Nicholl and others.

Rep. Coke's Reports.
 Roll. Abr. Rolle's Abridgment.
 Roll. R. Rolle's Reports.

S. M. L. Smith's Leading Cases.
 Salk. Salkeld's Reports.
 Saund. Saunders's Reports.
 Scott Scott's Reports.
 Sco. N. R. Scott's New Reports.
 Show. Shower's Reports.
 Sid. Siderfin's Reports.
 Sol. Jour. Solicitors' Journal.
 Sta. Starkie's Reports.
 Stra. Strange's Reports.
 Swans. Swanston's Reports.

T. L. R. Times Law Reports.
 T. R. Term Reports, Durnford and East.
 T. & R. Turner and Russell's Reports.
 Taunt. Taunton's Reports.
 Tyr. Tyrwhitt's Reports.

Vern. Vernon's Reports.
 Ves. jun. Vesey's, jun., Reports.
 Ves. or Ves. sen. Vesey's, sen., Reports.

W. N. Weekly Notes.
 W. R. Weekly Reporter.
 Wats. Sh. Watson on Sheriffs.
 West West on Extent.
 Wightw. Wightwicke's Reports.
 Will. Woll. & H. Willmore, Wollaston, and Hodges' Reports.
 Wils. Wilson's Reports.

Y. & C. Younge and Collyer's Reports.
 Y. & J. Younge and Jervis's Reports.

ADDENDA ET CORRIGENDA.

Page 52, line 4, *for* "receipt" *read* "service."

Page 73, last line, *after* "p. 291," *read* "*et seq.*"

Page 75, line 8, *after* "177," *read* "and see this case generally, as also *Roger v. Kenny*, cited *ante*, p. 73, in relation to *Lien*."

Page 84, line 31, *after* "rr. 8—15, R. S. C. 1883" *read* "such section and 8—14 of such Rules are set out *post*, p. 365."

Page 312, line 27, *add* "But see *ante*, p. 310."

Page 319, line 4, *add after word* "effect" "See, however, *Thomas v. Kelly*, cited *post*, p. 325."

Page 361, margin, *for* "50l." *read* "20l."

Page 379, line 30, *after* "189," *read* "See, however, on this point *ante*, pp. 287, 288."

Page 389, line 9, *add after cited case of Hyland v. Lennox* "The above statement with regard to the execution creditor's liability for costs must, however, be taken subject to the provisions of Ord. LVII. rr. 16 and 17, *ante*, pp. 374, 375, 388."

Page 518, line 21, *for* "1 Q. B. D." *read* "[1892] 1 Q. B."

Page 57 et seq. "Indorsements on the Writ of Execution."

Page 81, "Death of Parties."

These portions to be read subject to the alteration of the law effected by the Sale of Goods Act, 1893 (which Act was not passed until 20th February, 1894, and, therefore, after this Work went to press).

SHERIFF LAW.

CHAPTER I.

APPOINTMENT OF SHERIFF AND HIS OFFICERS.

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Appointment and Qualification of Sheriff.

By sect. 3 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), Annual appointment of sheriff and duration of office.

“(1.) A sheriff shall be annually appointed for every county (*a*).
“(2.) Save as provided by this Act, a sheriff shall not hold office for more than one year, and a grant after the passing of this Act of the office for more than one year shall be void.

“(3.) The office of sheriff or of any officer of a sheriff shall not become void by reason of the demise of the Crown, or in Cornwall of the Duchy of Cornwall, but the person holding the office shall, unless sooner removed or superseded, continue in office for the remainder of his term in like manner as if such demise had not taken place.”

By sect. 4, “A person shall not be appointed sheriff nor bailiff of a franchise except he have sufficient land within his county or bailiwick to answer the Queen and her people” (*b*). Qualification of sheriffs.

(*a*) The expression “county” means a county at large, and does not include a county of a city or a county of a town.

(*b*) The following persons are exempt from serving as sheriff, viz. :—Officers of customs (39 & 40 Vict. c. 36, s. 9), commissioners, collectors,

Same person
not to be
chosen twice
in three years.

By sect. 5, "A person who has been sheriff of a county for a whole year shall not within three years next ensuing be appointed sheriff of that county unless there is no other person in the county qualified to fill the office."

Nomination
and appoint-
ment of
sheriffs.

By sect. 6, "(1.) On the twelfth day of November in every year (or if that day fall on a Sunday then on the ensuing Monday) persons fit to serve as sheriffs shall be nominated for every county at the Royal Courts of Justice in the manner that has been heretofore used and observed (*b*), and shall be so nominated by the following great officers, namely, the Lord High Chancellor of Great Britain, the Lord High Treasurer, or if there is no Lord High Treasurer, the Chancellor of the Exchequer, the Lord President and others of her Majesty's Most Honourable Privy Council, and the Lord Chief Justice of England, or any two or more of such great officers, taking to them the judges of her Majesty's High Court of Justice, or any two or more of them.

"Pricking"
of sheriff to
be notified in
London Gazette
and warrant
transmitted
to person
"pricked."

"(2.) Whenever her Majesty has duly pricked a person to be sheriff of a county, the same shall be forthwith notified in the *London Gazette*; and a warrant in the form in the First Schedule to this Act shall be forthwith made out and signed by the Clerk of the Privy Council and transmitted by him to the person so pricked; and the appointment of sheriff so made shall be of the same effect as if made by patent under the Great Seal; and every sheriff so appointed upon making the declaration of office in this Act mentioned shall by virtue of this Act only and without payment of any fee have and exercise all powers, privileges, and authorities usually exercised and enjoyed by sheriffs of counties in England.

Duplicate of
warrant to be
transmitted to
clerk of peace
of county.

"(3.) A duplicate of the said warrant shall within ten days after the date thereof be transmitted by the Clerk of the Privy Council to the clerk of the peace of the county for which such

officers or persons employed under the authority of the Commissioners in relation to Inland Revenue (53 & 54 Vict. c. 21, Inland Revenue Regulation Act, 1890, s. 8, and see "definitions," s. 39), and commissioned officers of her Majesty's regular forces on full pay (44 & 45 Vict. c. 58, s. 146). The liability of officers of the auxiliary forces to be nominated to the office of sheriff is not affected by their battalions or corps being assembled for annual training at the time of nomination (44 & 45 Vict. c. 58, s. 181, sub-s. 5). But a sheriff being a militia officer shall during embodiment be discharged from personally performing the office of sheriff, and the under-sheriff shall be answerable for its execution in the high sheriff's name (45 & 46 Vict. c. 49, s. 40).

(*b*) See last note.

person is appointed sheriff and shall be enrolled and kept by the said clerk of the peace without fee.

“(4.) Nothing in this section shall apply to the counties of Cornwall, Lancaster, or Middlesex.”

By sect. 32, “One sheriff may continue as heretofore to be appointed for the counties of Cambridge and Huntingdon as if they were one county.”

Application of Act to Cambridge and Huntingdon.

The sheriffs of the City of London were formerly sheriffs of London and the sheriff of Middlesex. For the City they were two sheriffs; for Middlesex they acted as one, dividing the individual appointment between them, and putting their plural signature to documents written in the singular, as by the sheriff of Middlesex. But by the operation of the Local Government Act, 1888, the Crown appoints the sheriff of Middlesex as well as for the county of London, and the authority of the sheriffs of London is restricted to the City.

The sheriffs of London and the sheriff of Middlesex.

The sheriffs of the City of London are elected annually by such of the freemen of the City of London as are liverymen of the various companies. The election takes place on the 24th of June. The persons in nomination are as follows, and are put in nomination in the following order:—(1) All aldermen who have not served the office; (2) Persons nominated by the Lord Mayor between the 14th of March and 14th of May, such persons to be in nomination for five years (the Lord Mayor must not nominate more than three freemen, and any persons, so nominated, may be discharged from nomination on payment within a fortnight to the Chamberlain of 200*l.*); and (3) Any person free of the city, nominated by two liverymen (such person to be discharged from election or nomination on making oath before the Lord Mayor and Court of Aldermen that he does not possess real and personal estate separately or together of the value of 30,000*l.*). In the event of a contest the poll is taken on the third day under the City of London Ballot Act, 1887, the Secondary (c) being the returning officer.

By 45 & 46 Vict. c. 50 (Municipal Corporations Act), s. 170, “(1.) The council of every borough being a county of itself, and of the city of Oxford, shall on the ninth of November in every year appoint a fit person to execute the office of sheriff.

Appointment of sheriff in counties of cities and counties of towns.

“(2.) The appointment shall be made at the quarterly meeting of the council immediately after the election of the mayor.

(c) As to the office of Secondary, see *post*, p. 7, under title “Under-Sheriff.”

“(3.) The sheriff shall hold office until the appointment of his successor.

“(4.) He shall have the same duties and powers as the sheriff or the person filling the office of sheriff in the respective borough or city would have had if this Act had not been passed.”

Application of
Act to sheriffs
of counties of
cities and
counties of
towns.

By sect. 36 of the Sheriffs Act, 1887, “(1.) The sheriff of a county of a city or a county of a town other than London shall continue to be appointed in manner provided by the Municipal Corporations Act, 1882, and shall hold office for the term in that Act mentioned, and in the event of the death or incapacity of a sheriff so appointed, the council of the said city or town shall forthwith appoint another fit person to execute the office ;

“(2.) A person may be appointed to be such sheriff if he have sufficient property, whether of land or personalty, to answer the Queen and her people ;

“(3.) Every such sheriff shall perform the same duties as heretofore, and may receive such fees and remuneration out of the borough fund or other accustomed fund as have heretofore been accustomed ;

“(4.) Save as aforesaid this Act shall apply to a sheriff of a county of a city or a county of a town in like manner, as nearly as may be, as it applies to the sheriff of a county, and any jurisdiction by this Act vested in the justices in general or quarter sessions may be exercised, so far as regards constables, by the council, and so far as regards other matters by the recorder of the said city or town.”

Declaration
of office.

By sect. 7 of same Act, “(1.) Every sheriff shall, before he enters on the execution of his office, make and subscribe a declaration in the form in the Second Schedule to this Act or to the like effect before one of the judges of her Majesty’s High Court of Justice or before a justice of the peace for the county of which he is sheriff.

“(2.) Every sheriff shall continue to be and act as sheriff until his successor has made the said declaration and entered upon office.”

Declaration of Sheriff and Under-Sheriff.

I, A. B., of _____, in the county of _____ do solemnly declare that I will well and truly serve the Queen’s Majesty ^(d) [and also his Royal Highness _____ Duke of Cornwall] in the office of { sheriff, } of the county of _____ and promote her { under-sheriff }

(d) The words within brackets to be added in case of the Duchy of Cornwall.

Majesty's(e) [and his Royal Highness's] profit in all things that belong to my office as far as I legally can or may; I will truly preserve the Queen's rights(e) [and the rights of his Royal Highness] and all that belongeth to the Crown(e) [or Duchy of Cornwall]; I will not assent to decrease, lessen, or conceal the rights of the Queen or of her franchises(e) [or the rights of his Royal Highness, or of his franchises]; and whenever I shall have knowledge that the rights of the Crown(e) [or Duchy] are concealed or withdrawn in any matter or thing I will do my utmost to make them be restored to the Crown(e) [or Duchy] again; and if I may not do it myself I will inform the Queen(e) [or his Royal Highness] or some of her Majesty's judges thereof; I will not respite or delay to levy the Queen's debts for any gift promise reward or favour where I may raise the same without great grievance to the debtors; I will do right as well to poor as to rich in all things belonging to my office; I will do no wrong to any man for any gift reward or promise nor for favour or hatred; I will disturb no man's right, and will truly and faithfully acquit at the Exchequer all those of whom I shall receive any debts or sums of money belonging to the Crown(e) [or Duchy]; I will take nothing whereby the Queen(e) [or his Royal Highness] may lose or whereby her(e) [or his] right may be disturbed injured or delayed; I will truly return and truly serve all the Queen's writs according to the best of my skill and knowledge; [I will take no bailiffs into my service but such as I will answer for;] (f) I will truly set and return reasonable and due issues of them that be within my bailiwick according to their estate and circumstances, and make due pannels of persons able and sufficient and not suspected or procured as is appointed by the statutes of this realm; [I have not sold or let to farm, nor contracted for, nor have I granted or promised for reward or benefit, nor will I sell or let to farm nor contract for or grant for reward or benefit by myself or any other person for me or for my use directly or indirectly my sheriffwick or any bailiwick thereof or any office belonging thereunto or the profits of the same to any person or persons whatsoever;] (g) I will truly and diligently execute the good laws and statutes of this realm, and in all things well and truly behave myself in my office for the honour of the Queen(e) [and his Royal Highness] and the good of her subjects, and discharge the same according to the best of my skill and power.

(e) The words within brackets to be added in case of the Duchy of Cornwall.

(f) In the case of under-sheriffs, omit the words between brackets.

(g) In the case of under-sheriffs, omit the words between the brackets, and say: ["I have not bought purchased or taken to farm or contracted for nor have I promised or given any consideration nor will I buy purchase or take to farm or contract for promise or give any consideration whatsoever by myself or any other person for me or for my use directly or indirectly to any person whomsoever for the office of under-sheriff of the county of _____ which I am now to enter upon and enjoy nor for the profits of the same nor for any bailiwick thereof or any other place or office belonging thereunto; I have not sold nor contracted for or let to farm, nor have I granted or promised for reward or benefit by myself or any other person for me or for my use directly or indirectly any bailiwick thereof or any other place or office belonging thereunto"].

Filing and exemption from duty of declaration of office.

By sect. 30 of the Sheriffs Act, 1887, “(1.) Every declaration of office made under this Act by a sheriff of a county or his under-sheriff shall be exempt from stamp duty and be transmitted to the clerk of the peace of the county, and be by him filed among the records of his office.

Fee of clerk of peace for filing declaration.

“(2.) For filing such declaration the clerk of the peace shall be entitled to demand and receive from such sheriff or under-sheriff such fee as may be from time to time fixed in pursuance of the enactments relating to fees of clerks of the peace, and until any fee is so fixed a fee of five shillings.”

As to oath of office to be taken by the sheriffs of the City of London.

Referring to the sheriffs of the City of London, every person duly elected sheriff must, either upon the day of election or at any time between that day and the 14th of September, and in the same year, appear before the Court of Aldermen, and shall then and there become bound to the City Chamberlain in the penal sum of 1,000*l.* that he will appear in the public assembly in the Guildhall, at the vigil of St. Michael Archangel, between the hours of 12 and 3 o'clock, and take the oath of office. In the event of any person so bound failing to appear, he is fined, if an alderman, 600*l.*, if not an alderman, 400*l.* It is the duty of the Secondary to attend the Queen's Remembrancer, with the City Solicitor, on the receipts of warrants of approval of the new sheriffs by her Majesty.

Under-Sheriff.

Obligation of sheriff to appoint under-sheriff.

By sect. 23 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), “(1.) Every sheriff shall within one month after the notification of his appointment in the *London Gazette* by writing under his hand appoint some fit person to be his under-sheriff, and shall transmit a duplicate of such written appointment to the clerk of the peace for the county, which shall be filed by him among the records of his office.

Fee of clerk of peace for filing duplicate of appointment.

“(2.) For filing such duplicate the clerk of the peace shall be entitled to demand and receive from the under-sheriff such fee as may be from time to time fixed in pursuance of the enactments relating to fees of clerks of the peace, and until any fee is so fixed a fee of five shillings.

Declaration to be made by under-sheriff.

“(3.) Every under-sheriff shall before he enters on the execution of his office make a declaration in the form in the

Second Schedule to this Act (i) or to the like effect before one of the judges of Her Majesty's High Court of Justice, or before a justice of the peace for the county for which such under-sheriff is appointed."

As to filing and exemption from duty of such declaration, see sect. 30, *ante*, p. 6.

Form of Appointment.

To all to whom these presents shall come greeting : Whereas I of in the county of have been appointed during Her Majesty's pleasure sheriff of the said county by a warrant of appointment bearing date the day of A.D. Now know ye that I have nominated constituted and appointed and by these presents do nominate constitute and appoint of in the said county gentleman my under-sheriff of and for the said county and do depute and authorize him to act and to execute for me and in my stead all things to the said office of sheriff in anywise appertaining or belonging.

Dated this day of A.D.

With regard, however, to the shrievalty of the City of London, the office of the Secondary of the City of London corresponds with that of an ordinary under-sheriff, and as the absolute estate and interest of sheriffs of the City of London belong to the Corporation, and as it is the only body which discharges the office of sheriffs of the City of London, the Corporation, to guard against loss, appoint the subordinate officers, including therefore the Secondary, or under-sheriff. The office of Secondary is accordingly held direct from the Corporation. In the City Records of the third year of Edward II., 1309—10, Liber 2, fol. 1, will be found the oaths of the Secondary.

Secondary of
the City of
London.

The gentlemen known as under-sheriffs, who are appointed by the sheriffs of the City of London, on taking office and nominated by them, have no legal status in the City at all, as the Corporation from the earliest times have provided for the discharge of the duties of the shrievalty. The actual duties of the under-sheriffs, so appointed by the sheriffs, consist of attending the sheriff on all state occasions, and also keeping order at the Central Criminal Court.

In the case of ordinary under-sheriffs, it is customary for the under-sheriff to give his sheriff security by a bond or covenant for the latter's indemnification against any loss through default on the part of the under-sheriff or his servants, and generally

Custom for
under-sheriff
to give sheriff
security by
bond.

(i) *Ante*, p. 4.

for the under-sheriff's faithful discharge of the various duties of his office.

Form of Bond.

THIS indenture made the day of 18 between A. B. of in the county of of the first part and C. D. of in the county of of the other part: Whereas the said A. B. by her Majesty's warrant of appointment bearing date the day of 18 has been appointed sheriff of the said county during pleasure and hath taken upon himself the duties thereof: And whereas also at the instance of the said C. D. the said C. D. hath been appointed by the said A. B. to be under-sheriff of the said county. In consideration whereof and in consideration of the covenants hereinafter mentioned on the part of the said A. B., the said C. D. for himself his heirs executors and administrators doth hereby covenant promise and agree to and with the said A. B. his executors and administrators that he the said C. D. shall and will well and sufficiently perform the office of under-sheriff; and shall and will save harmless and keep indemnified the said sheriff his heirs executors and administrators of and from all manner of actions causes of action suits fines and amerciaments contempts and forfeitures and all other charges and incumbrances whatsoever which shall or may happen to be assessed or imposed upon the said A. B. as sheriff by reason of the non-feasance misfeasance or malfeasance of him the said C. D. or for or by reason of any other cause or thing whatsoever that should or ought to be done by the said under-sheriff or by the clerks bailiffs or servants to be employed concerning the said office. And further that the said under-sheriff shall from time to time give due notice to the said sheriff of such personal attendance as shall be requisite to be made by him; and shall attend on and assist him thereat and be aiding and assisting in raising and levying such force within the said county as the sheriff shall be enjoined to raise; and cause to be executed all such persons as shall be sentenced to death according to his or her sentence and well and faithfully do execute and perform all and every act matter and thing belonging to the said office of under-sheriff. And the said A. B. doth hereby for himself his heirs executors and administrators covenant promise and agree to and with the said C. D. his executors and administrators in manner following: that is to say, that the bonds or obligations to be entered into or given to the said sheriff by his bailiffs shall be considered as well for the indemnity of the said under-sheriff as of the said sheriff himself. And that the said under-sheriff performing the aforesaid covenants shall have and enjoy the said office of under-sheriff during the shrievalty of the said A. B. and keep by himself or deputy the courts by law established in the said county and have and take all lawful fees dues profits and emoluments whatsoever belonging to the said office of sheriff. In witness whereof the said parties to these presents have hereunto set their hands and seals on the day and year first above written.

Signed sealed and delivered by the said

A. B. in the presence of

A. B. (L.S.)

Signed sealed and delivered by the said

C. D. in the presence of

C. D. (L.S.)

In the case of the Secondary of the City of London, as above intimated, that office is held direct from the Corporation, who are liable to the Crown for any misconduct on the part of the sheriffs' Secondary and sheriffs' officers. The sheriffs take no benefits from their office, and they and the Corporation are indemnified against loss by the Secondary, who gives a bond to the Corporation himself in an unlimited amount, and, in addition thereto, two sureties jointly and severally bound in the sum of 2,500*l*.

As to the bond given to the Corporation of London by the Secondary.

By sect. 25 of the Sheriffs Act, 1887, "(1.) Where the sheriff of a county dies before the expiration of his year of office or before he is lawfully superseded, the under-sheriff by him appointed shall nevertheless continue in office and shall until another sheriff be appointed for the said county and has made the declaration of office, execute the office of sheriff, in the name of the deceased sheriff, and be answerable for the execution of the said office as the deceased sheriff would by law have been if living; and the security given to the sheriff so deceased by the said under-sheriff and his pledges shall remain and be a security to the Crown and to all persons whomsoever for such under-sheriff's due execution of the offices of sheriff and under-sheriff.

Execution of office by under-sheriff on death or suspension of sheriff.

"(2.) When it becomes the duty of an under-sheriff to act as sheriff under the provisions of this section he may by writing under his hand appoint a deputy."

The under-sheriff may practise as a solicitor during his term of office. 6 & 7 Vict. c. 73, Sch. I., Part I.

And see statutory prohibition of sale of office of under-sheriff *per* sect. 27 of the Sheriffs Act, 1887, under title "Liabilities and Rights of Sheriff, and Remedies against Sheriff," *post*, p. 498.

Precedence.

"It may be interesting to refer to the social status of the high sheriff. Ancient learned text-writers, including Blackstone, have asserted not only that the sheriff, 'as keeper of the Queen's peace, both by common law and special commission, is the first man in the county,' but also that he is 'superior in rank to any nobleman therein.' From this it has frequently been presumed that the high sheriff gained precedence within his own county over dukes and all ranks of the peerage, including

the lord lieutenant of the county. General favour was accredited for such a view of the sheriff's precedence by the late Mr. Disraeli, afterwards Earl of Beaconsfield, having stated in his book, 'Lothair,' 'There is no doubt that, in the county, the high sheriff takes precedence of everyone, even the lord lieutenant' (vol. ii. p. 78). But with all deference to such an authority as the late Prime Minister, it is an established fact, recognized by the late Garter King at Arms, Sir Charles Young, that the lord lieutenant, as *locum tenens* of the Sovereign, has precedence of everyone in the county, and that the high sheriff does not, under any circumstances, precede the lord lieutenant, nor, socially, take precedence of any peer. The fact that the sheriff presides at a county meeting involves no question of precedence, because the sheriff having convened the freeholders of his county, who owe suit and service at his county court, necessarily presides over them. Sir Bernard Burke also says ('Reminiscences,' 1884): 'Neither the lord lieutenant of a county nor the high sheriff is assigned any place in the scale of precedence, and consequently neither derives any *social* precedence from the office he holds. A particular place on the scale of precedence is an honour derived from the Crown or Parliament, or confirmed by authorized usage, and can no more be interfered with than the right to the dignity of a peerage which a Royal Patent has conferred. Between the two, the lord lieutenant of a county and the high sheriff, the higher local position appertains, I think, to the lord lieutenant of a county.'

"The meaning of the quotation from Blackstone depends upon the construction of the word 'nobleman.' The view favouring the sheriff's precedence was derived from the dictum of Chief Justice Coke, in the case of *Chune v. Pyot* (*Sheriff of London*), Rolle's 'Report,' i. 237, in which the Chief Justice said: 'Anciently it was the earls who exercised this office of sheriff, and then they held the office as long as they wished; but afterwards, when estates for life and of inheritance were granted, shrievalties were granted, and sheriffs have the same power the ancient earls had, of which dignity there were some relics to that day, for instance, the 'White Wand': and the patent of the grant of this office is in these words, *Commisimus vobis custodiam comitatûs*; and the sheriff takes precedence of every nobleman during office (*il prist le lieu de chescun noble home durant l'office*).' But the truth is, that the expression *noble home*, when used by the Chief Justice in James I.'s reign (1616),

implied nothing more than that the sheriff was the head of the commonalty of the county; because, at that time, the term 'nobleman' was not confined to the peerage, but applied to knights, and gentlemen below the peerage. This is proved by the following sentence in Camden's 'History of Elizabeth' (3rd edition, page 29), under the date of 1559: 'Cuthbert Scot, of Chester, Richard Pate, of Worcester, and Thomas Goldwell, of St. Asaph, voluntarily departed the land, and also certain nuns, as did likewise afterwards some *noblemen*; of whom those of better note were Henry Lord Morley, Sir Francis Inglefield, Sir Robert Peckham, Sir Thomas Shelley, and Sir John Gage.' And it is further proved by Coke's own interpretation of the word 'nobleman' in his note (2nd 'Institute,' page 583), upon a passage in the statute 35 Edward I., in which note Coke says: 'Knights of the shire and other gentlemen of the House of Commons are included under these words *aliorum nobilium*; for *Nobilitas est duplex, superior et inferior*. Superior belongeth to the lords of Parliament, and inferior to knights and gentlemen of name and blood, who are in this Act termed *nobiles*' (k).

Dress.

The proper dress for sheriffs is court dress (*e.g.*, black velvet dress court suit, with knee breeches and silk stockings, or claret-coloured coat and trousers, the coat being of same shape as dress uniform of consuls and members of diplomatic corps, and the trousers having a gold stripe), or military or other uniform, with, in the case of a City sheriff, his robe of office.

Under-sheriffs usually wear evening dress, or sometimes court dress. It would seem, however, that they have no particular dress as a matter of right, except, perhaps, as to court dress, when they have been presented at court.

Sheriff's London Deputy.

By sect. 24 of the Sheriffs Act, 1887, "Every sheriff shall appoint a sufficient deputy, who shall be resident or have an

Obligation
of sheriff to
appoint de-

(k) Extract, with permission, from the paper of Mr. Davenport, under-sheriff of Oxford, set out in Appendix to Report from Select Committee on High Sheriffs.

puty resident
in London.

office within one mile from the Inner Temple Hall, for the receipt of writs, the granting of warrants thereon, the making of returns thereto, and the acceptance of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff."

A delivery of a writ to a sheriff's deputy in London is a delivery to the sheriff. *Woodland v. Fuller*, 3 P. & D. 570; 11 A. & E. 859.

Appointment.

——— to wit: sheriff of the county aforesaid to gentleman, greeting: I do hereby nominate constitute and appoint you to be my deputy for the receipt of writs granting warrants thereon making returns thereto and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to me as sheriff as aforesaid.

Given under the seal of my office this day of 18 .

Bailiffs.

Appointment
of bailiffs,
bound and
special.

Bailiffs are also appointed by the sheriff for the purpose of executing writs directed to him. There appears, however, to be no special form for their appointment. They are the ordinary officers of the sheriff, and are bound by him in an obligation with sureties for the faithful discharge of their office; so that, in the event of any loss arising from a breach of it, he is indemnified. For the form of bond taken by the sheriff, see *post*, p. 15. Bailiffs, it seems, are not officers of the Courts, and the Court has therefore refused to enforce their undertakings. *Brown v. Gerard*, 3 D. P. C. 217. It is, however, empowered to punish them for extortion and other offences under sect. 29 of the Sheriffs Act, 1887. A special bailiff is an officer appointed by the sheriff merely for the execution of a particular writ at the instance of the party suing out the writ, or his solicitor. An infant cannot be a bailiff or sheriff's officer, as such an office is one of responsibility and trust unfit to be performed by an infant. *Cuckson v. Winter*, 2 M. & R. 317. A deputy cannot be appointed by a sheriff's bailiff. *Jackson v. Hill*, 10 A. & E. 484. The warrant should be directed to the officer who is to execute the writ, and his name should be mentioned in it. It appears, however, that the warrant may be directed to the chief bailiff of a liberty and his deputies, as there may be known deputies within the franchise, and the sheriff may make them

his bailiffs without further describing them. *Jackson v. Hill*, 10 A. & E. 486.

A sheriff is liable for the acts of his officer acting under colour of his warrant. *Anon.*, Lofft. 81, and see *Saunderson v. Baker*, 3 Wils. 309; 2 Bl. W. 832; *S. P.*, *Ackworth v. Kempe*, 1 Dougl. 40; as also *Smith v. Milles*, 1 T. R. 480; and *Gregory v. Cotterell*, 5 El. & Bl. 571; 25 L. J. Q. B. 33 (1). Moreover, the sheriff is responsible for the acts of his officer, though not within the line of his duty, provided such acts are afterwards assented to or adopted by the sheriff. He is civilly liable for the misconduct of his officer in executing a writ, though the act done is contrary to the express terms of the writ. *Smart v. Hutton*, 8 A. & E. 568, n.; 2 N. & M. 426 (m).

Sheriff's liability for acts of officer.

Appointing a special bailiff, or giving special directions to a particular bailiff for the execution of a *fi. fa.*, discharges the sheriff. *Porter v. Viner*, 1 Chit. R. 613; and see *Pallister v. Pallister*, 1 Chit. R. 614. Moreover, the general rule is that, where a plaintiff appoints a special bailiff, he cannot rule the sheriff to return a writ of *fi. fa.* See *Harding v. Holder*, 9 D. P. C. 659; 3 Scott, N. R. 293; 2 M. & G. 914.

Special bailiffs.

Again, if the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ. *De Moranda v. Dunkin*, 4 T. R. 119; but a mere request that a particular officer may be employed in the execution of process does not constitute that officer a special bailiff of the party. *Corbet v. Brown*, 6 D. P. C. 794; *S. P.*, *Balson v. Meggat*, 4 D. P. C. 557.

Where a plaintiff appoints his own bailiff to execute a writ in arrest process, the sheriff is relieved from all responsibility

(1) It will be borne in mind that in the case of the City of London, the Corporation are liable to the Crown for any misconduct on the part of the sheriffs' Secondary and sheriffs' officers. In this connection the Secondary must, however, (a) superintend and direct the duties to be performed by the serjeants-at-mace and their yeomen, and in particular use his utmost diligence to compel the serjeants-at-mace to perform their duty as strictly and promptly as possible relative to executions; and (b) afford every facility in his power to hear complaints against the serjeants-at-mace, and give to the aggrieved parties such redress as may be in his power and appears to him to be just and necessary; whilst he must record all such complaints, with his decision thereon, so that they may, at any time, be referred to by the Court of Common Council. It is also the duty of the Secondary, on the part of the sheriffs, to see to proper security being given by the serjeants-at-mace.

(m) See *ante*, p. 9, as to shrievalty of the City of London.

until the party is arrested and delivered into the sheriff's actual custody. *Ford v. Leche*, 1 N. & P. 737; 6 A. & E. 699.

And see, as to special bailiffs, *Doe v. Tyre*, 7 Sc. 704; 7 D. P. C. 636; *Alderson v. Davenport*, and *Perrin v. Davenport*, 13 L. T. Ex. 352; *Seal v. Hudson*, 2 B. C. Rep. 55; 4 D. & L. 760; *Jackson v. Hill*, 10 A. & E. 477; 2 P. & D. 455; and *Tait & Co. v. Mitchell*, 22 L. R. Ir. 327; under "Writ of *Fi. Fa.*, Reporting result, Return, &c."; and see as to special bailiffs under title "Arrest."

See also, under this head, *Ramsay v. Eaton*, 10 M. & W. 22.

Declaration
by bailiffs, &c.

By sect. 26 of the Sheriffs Act, 1887, "Every deputy bailiff and officer of a sheriff or under-sheriff, and every other person who has authority or takes upon himself to impanel or return any inquest, jury, or tales, or to intermeddle with the execution of writs issued by any court of record, shall before he does so make a declaration (which shall be exempt from stamp duty) in the form in the second schedule to this Act, or to the like effect, before any judge of the High Court of Justice or justice of the peace for the county or borough in which he exercises such authority."

Form of Declaration for Bailiff, Deputy, or Officer of Sheriff.

I, A. B., do hereby solemnly and sincerely declare that I will not use or exercise the office of _____ corruptly during the time that I shall remain therein, neither shall nor will accept, receive, or take by any colour, means, or device whatsoever, or consent to the taking of any manner of fee or reward of any person or persons before the empannelling or returning of any inquest, jury, or tales in any court of record for the Queen or betwixt party and party above such fees as are allowed for the same by law, but will according to my power truly and indifferently with convenient speed empanel all juries and return all such writs touching the same as shall appertain to be done by my duty or office during the time that I shall remain in the said office.

And see statutory prohibition of sale of office of bailiff, *per* sect. 27 of the Sheriffs Act, 1887, under title "Liabilities and Rights of Sheriff, and Remedies against Sheriff," *post*, p. 498.

[*Form of Bond.*

Form of Bond.

KNOW ALL MEN BY THESE PRESENTS, that we are held and firmly bound unto of in the of sheriff of the county of of in the sum of of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment to be well and truly made, we bind ourselves, jointly and severally, our and each of our heirs, executors and administrators, and every of them, firmly by these presents. Sealed with our seals. Dated this day of in the year of our Lord one thousand eight hundred and

WHEREAS the above-named sheriff hath at the instance and request of the above-bounden and his sureties, and in consideration of the security hereby given, appointed the said to be and act as one of his bailiffs within the said county of and to be his assistant bailiff: THE CONDITION of the above-written obligation therefore is such, that if the above bounden and

his assistant, do and shall well and truly obey and execute all warrants, precepts, processes and commandments to him or them directed, or to be directed from the said sheriff, or his under-sheriff, deputy or agent, and shall and do make true and sufficient returns or answers to the same in writing, on or before the return days mentioned in such warrants, precepts or processes respectively, and pay, or cause to be paid, all moneys levied or received by him or them, by virtue of any such warrant, precept or process, to the said sheriff, under-sheriff or agent, on or before the return day of such warrants, precepts or processes respectively, and the true consideration or purchase-money mentioned in every assignment or bill of sale executed by the said sheriff, under-sheriff or agent, notwithstanding the acknowledgment of the receipt thereof by the said sheriff contained in any such bill of sale or assignment. And if the said bailiff and his assistant do not ask, levy or directly or indirectly receive any fee or fees due to the said sheriff or his under-sheriff, or to him the said bailiff, for the executing of any warrant, precept or other process whatever, but such as are warranted by the laws and customs of this kingdom. And if the said bailiff or his assistant do and shall levy and receive all and every sum and sums of money which shall be or become payable for the poundage and other fees for the execution and return of all and every process, warrant, precept and commandment, to him or them to be directed, and do, and shall pay, or cause to be paid to the said sheriff, or his under-sheriff or agent, all such sum and sums of money, upon demand, with interest thereon from the time or times of such demand. And also if the said bailiff or his assistant shall and do make true return and inventory of all goods and chattels seized in execution, and before removal thereof pay the rent in arrear, not exceeding one year, and all taxes, which by law ought to be paid. And also if the said bailiff do and shall give his personal attendance on the said sheriff, under-sheriff or agent, during the continuance of all courts of assize,oyer and terminer, general and special gaol delivery, county courts, and courts of quarter session, and adjourned sessions, and also on the said courts respectively, during their respective sittings,

and do not depart home, or absent himself therefrom, without the leave of such respective courts. And also if the said bailiff shall be attendant upon the said sheriff, under-sheriff and agents or deputies, in conveying of prisoners to and from the common gaol of the said county, or to or from any other place or prison, and attend the execution of all prisoners sentenced to death. And also if the said bailiff do and shall make true and immediate answer to all rules, orders and letters sent or written to him. And also if the said bailiff or his assistant shall take any distress upon any distringas, warrant or other process whatsoever, then if he or they do and shall make true and lawful returns of the same and safely keep the distress so taken, and give up the same to the said sheriff, his under-sheriff or agent, when required. And also if the said bailiff, his executors and administrators, do and shall at all times hereafter, save, defend, keep harmless and indemnified the said sheriff, his under-sheriff and agent, and his and their heirs, executors and administrators, of, from, against or concerning the escape or escapes, rescue or rescues, of any prisoner or prisoners, or other person, which shall be in custody of the said bailiff, or his assistant or assistants, upon any warrant, precept or commandment from the said sheriff, his under-sheriff or agent, or his or their deputy or deputies. And also if the said bailiff and assistants shall and do observe and keep secret and undisclosed all matters and things concerning the said office of sheriff, which ought to be kept secret and undisclosed, and shall not directly or indirectly give or cause, or permit notice to be given to any defendant or other person against whom any warrant or process shall be directed to him the said bailiff, or his assistants, or do or cause, or permit any act to be done, or receive any money, gratuity, gift or promise, or omit or forbear to do any act whereby the execution of such process or warrant shall be in any wise defeated, delayed or impeded. And also if he the said bailiff and his assistants shall and do conduct safely to the common gaol of the said county all person and persons arrested, attached or taken by him at the expiration of twenty-four hours after he or they shall be so arrested, attached or taken, unless in the meantime a good and sufficient bail bond, or the amount of the debt, and 10% sterling to answer costs, be offered. And also if he the said bailiff, or his assistant or assistants, shall not, nor do let any person or persons in his or their lawful custody go at large on writs of execution, or in cases where such person or persons shall not be bailable by law, but do and shall immediately safely conduct all and every person and persons so taken and in custody to the said common gaol. And do and shall in all cases, wherein any person or persons in his or their custody is entitled by law to be bailed, take a bail bond in the usual manner, with two good housekeepers as sureties, fully responsible for the payment of double the sum to be named in any warrant or warrants to be directed to such bailiff or his assistant, and also sufficient sureties in replevin, and do and shall fully indemnify the said sheriff and his under-sheriff and agent from all sums of money, loss or damage whatsoever, in respect of the taking of any such bail or replevin bond. And also do and shall send such bail bonds, or the debts and 10% to answer costs, as the case may be, and the replevin bonds, into the sheriff's office on or before the day on which every such warrant, writ or process shall be return-

able, and shall and do comply in all things with the provisions of a certain Act of Parliament made in the thirty-second year of the reign of King George the Second, commonly called the *Lords Act*, and of all other Acts of Parliament now in force relating to the conduct and behaviour of bailiffs in the execution of their said office. And also if the said bailiff do and shall upon demand, well and truly pay unto the said sheriff, his under-sheriff or agent, all such sum and sums of money for which the said sheriff shall be fixed, or which he or his under-sheriff shall pay in any action or suit in which any warrant or precept shall be granted to the said bailiff or his assistant, together with the costs and expenses in respect thereof. And all costs and expenses incurred in defending the said sheriff, or in prosecuting any action or suit upon any bail bond, replevin bond or indemnity bond, taken by the said sheriff, or given as his security in any case where the said bailiff or his assistant shall have acted or assumed to act. And in prosecuting or opposing any motion in, or application to the court, touching or concerning any matter wherein the said bailiff or his assistant shall act as or assume to act as bailiff to the said sheriff, together with interest at 5*l.* per centum per annum upon all sums paid from the time or respective times of the payment thereof. And also if the said bailiff and his assistants do and shall in all things well and truly execute the office of bailiff to the said sheriff. And lastly, if the said bailiff and his said sureties, some or one of them, their, some or one of their heirs, executors and administrators, do and shall from time to time, and at all times hereafter, save, defend, keep harmless and indemnified the said sheriff and his under-sheriff and agent, and his and their heirs, executors and administrators, of, from and against all manner of actions, suits, attachments, escapes, fines, penalties, amerciaments and other troubles, costs, charges, damages and expenses whatsoever, which may be commenced, prosecuted, imposed or set upon them or either of them, or which they or either of them may suffer, pay or be liable unto, for or by reason of the executing, not executing, returning or not returning, or improper returning of any writ, warrant, process, mandate or precept, occasioned by the act, information or default of the said bailiff or assistant, the not taking bail, the taking insufficient bail, the not bringing into court the body of any defendant arrested by him, or by reason of extortion, escape, or any other cause whatsoever, happening by the act or default of the said bailiff or assistant. Then the above-written obligation to be void and of no effect, but otherwise to be and remain in full force and virtue.

Signed, sealed and delivered by .

As to officer's sureties, they are only liable for the due performance of the sheriff's duty. *Cook v. Palmer*, 6 B. & C. 739; 9 D. & R. 723. Officer's sureties, how far liable.

A sheriff cannot recover on an indemnity bond which has been procured by his own officer's fraud. *Raphael v. Goodman*, 3 N. & P. 547; 8 A. & E. 565.

A sheriff's officer's surety cannot discharge his obligation within the year without the consent of the sheriff and other Discharge of obligation by surety.

sureties. *Martin v. Wenman*, Lofft, 225; and see, as to officer's sureties, *Farebrother v. Worsley*, 1 Tyr. 424; 1 C. & J. 549; 5 C. & P. 102.

Franchises, &c.

Application
of Act to
franchises.

By sect. 34 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), "Where a lord of a franchise or any other person or body corporate has in any franchise, that is to say, any liberty, hundred, franchise, or other part of a county, the return or execution of writs, or any other of the privileges or duties of a sheriff, the following provisions shall apply to such lord, person, or body corporate (in this Act referred to as the bailiff of a franchise), that is to say:—

- "(a) The bailiff of a franchise shall either hold the office himself, or shall put in bailiffs having land in the bailiwick sufficient to answer the Queen and her people, and shall answer for such bailiffs; and every such last-mentioned bailiff shall make the like declaration as an under-sheriff;
- "(b) The sheriff of the county within which such franchise is situate shall within one month after a request made in that behalf by such lord appoint some sufficient deputy (*n*), at such cost to be paid by the said lord, and to reside at such convenient place in or near the franchise, as may be appointed from time to time by the Lord High Chancellor of Great Britain and the Lord Chief Justice of England or one of them;
- "(c) Every deputy so appointed shall reside at the said place, and, in the sheriff's name, shall receive and open, when tendered to him, all writs, the execution or return of which belongs to the bailiff of the franchise, and shall, without delay, issue to the said bailiff under the seal of the sheriff, and in such manner and form as the sheriff himself ought to do, the warrant required by law for the due execution of the said writs (*o*);
- "(d) The bailiff of the franchise and not the sheriff shall be liable for the non-execution, mis-execution, or insufficient return of any writs, or for any misconduct in the

(*n*) Adapt form of appointment of London deputy, *ante*, p. 12.

(*o*) Adapt ordinary warrant forms.

performance of the said office or for any breach of the provisions of this Act; and any fine imposed on the bailiff of the franchise or his bailiff or officer shall notwithstanding any grant be paid to the Crown; and

“(e) All the provisions of this Act (except as hereinafter mentioned) and every such enactment in any other Act as relates to the return of panels or juries, or to the due execution of any writ, or to the taking of fees, or to any extortion by sheriffs or their officers, or otherwise to the office and duties of sheriffs or their officers, shall, together with all the liabilities, punishments, and forfeitures thereby imposed, extend to such bailiff of the franchise and his bailiffs and officers in like manner as if he and they were a sheriff or sheriff’s bailiffs and officers; provided that the enactment as to the appointment and duration of office of a sheriff shall not apply, and such bailiff of the franchise and his bailiff shall be entitled to hold his office as long as he would have been entitled if this provision had not been enacted.

“(f) In the case of the non-return of a writ, if the sheriff returns that he has delivered the writ to a bailiff of a franchise, the sheriff shall be ordered to execute the writ notwithstanding the said franchise; and further to cause the bailiff of such franchise to attend before the High Court of Justice and answer why he did not execute the said writ.”

By sect. 35 of the same Act, “Every bailiff of a franchise within the meaning of the foregoing provisions of this Act, who, in times past, has been used, or ought by himself or a bailiff, to attend upon justices of assize or of gaol delivery and justices of the peace at large in any county, shall continue so to attend and execute all writs directed to him for the administration of justice in such franchise, and shall give his attendance upon and assistance to the sheriff at all courts of gaol delivery from time to time for the execution of prisoners.”

Duties of
bailiffs of
liberties, and
constables.

And see statutory prohibition of sale of offices, *per* sect. 27 of the Sheriffs Act, 1887, under title “Liabilities and Rights of Sheriff, and Remedies against Sheriff,” *post*, p. 498.

CHAPTER II.

OUTGOING SHERIFF.



By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 28:—

Outgoing
sheriff to turn
over prisoners
and process to
incoming
sheriff.

“(1.) Every sheriff shall at the expiration of his term of office make out and deliver to the incoming sheriff a correct list and account under his hand of all prisoners in his custody and of all rolls and writs in his hands not wholly executed by him, with all such particulars as may be necessary to explain to the incoming sheriff the several matters intended to be transferred to him, and shall thereupon turn over and transfer to the custody of the incoming sheriff all such prisoners, rolls and writs, and all records, books and matters appertaining to the office of sheriff.

Incoming
sheriff to sign
and give du-
plicate of list
to outgoing
sheriff.

“(2.) The incoming sheriff shall thereupon sign and give to the outgoing sheriff a duplicate of such list and account, which shall be a good and sufficient discharge to him of and from all the prisoners therein mentioned and the execution of the writs and other matters therein contained; and thereupon the incoming sheriff shall stand charged with the said prisoners and with the execution and care of the said rolls, writs and other matters contained in the said list and account.

Sheriff not
required to
make return
after six
months from
expiry of
office.

“(3.) A sheriff shall not be called upon to make a return of any writ after the expiration of six months from the date at which he ceases to hold his office.”

CHAPTER III.

GENERAL PRACTICE.

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Introductory.

THE practice of the Queen's Bench Division of the High Court and of the Crown Office is mainly regulated by the Rules of the Supreme Court, 1883, and the Crown Office Rules, 1886. Accordingly, such of these rules as directly bear on the subject of this work are reproduced in this chapter; whilst for any further information beyond that which is given in this work, the reader is referred to the current Annual Practice and to Short and Mellor's Practice of the Crown Office.

Practice under Rules of the Supreme Court, 1883.**ORD. XXXVI.—TRIAL.***Writ of Inquiry and Reference as to Damages.***Ord. XXXVI.**

Rule 56. The provisions of Rules 14, 15, 19, 34, 35, 36, and 37 of this Order shall, with the necessary modifications, apply to an inquiry, pursuant to a writ of inquiry.

Application
of Rules to an
inquiry.

Rule 57. In every action or proceeding in the Queen's Bench Division in which it shall appear to the Court or a judge that the amount of damages sought to be recovered is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the Court or a judge may direct that the amount for which final judgment is to be entered shall be ascertained by an officer of the Court, and the attendance of witnesses and the production of documents before such officer may be compelled by *subpœna*, and such officer may adjourn the inquiry from time

How damages
ascertained
where a
matter of cal-
culation.

to time, and shall indorse upon the order for referring the amount of damages to him the amount found by him, and shall deliver the order with such indorsement to the person entitled to the damages, and such and the like proceedings may thereupon be had as to taxation of costs, entering judgment, and otherwise, as upon the finding of a jury upon a writ of inquiry.

Assessment of damages in continuing cause of action.

Rule 58. Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

Ord. XLII.

ORD. XLII.—EXECUTION.

Judgment or order to be obeyed without demand.

Rule 1. Where any person is by any judgment or order directed to pay any money, or to deliver up or transfer any property real or personal to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand.

Waiver of conditional judgment or order.

Rule 2. Where any person who has obtained any judgment or order upon condition does not perform or comply with such condition, he shall be considered to have waived or abandoned such judgment or order so far as the same is beneficial to himself, and any other person interested in the matter may on breach or non-performance of the condition take either such proceedings as the judgment or order may in such case warrant, or such proceedings as might have been taken if no such judgment or order had been made, unless the Court or a judge shall otherwise direct.

How judgment for payment of money enforced.

Rule 3. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof.

For payment into Court.

Rule 4. A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment.

For delivery of land.

Rule 5. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.

For recovery of property other than land or money.

Rule 6. A judgment for the recovery of any property other than land or money may be enforced :

- (a) By writ for delivery of the property :
- (b) By writ of attachment :
- (c) By writ of sequestration.

Rule 7. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.

To do or abstain from doing any act.

Rule 8. In these Rules the term "writ of execution" shall include writs of *fieri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case.

Meaning of "writ of execution" and "issuing execution."

Rule 9. Where a judgment or order is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a judge for leave to issue execution against such party. And the Court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment or order, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried.

Execution of conditional judgment.

Rule 10 is cancelled by Order XLVIII^A., Rule 8, R. S. C., June, 1891, which is as follows:—Where a judgment or order is against a firm, execution may issue:

Execution of judgment against a firm.

- (a) Against any property of the partnership within the jurisdiction;
- (b) Against any person who has appeared in his own name under Order XLVIII^A., Rules (5) or (6), or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
- (c) Against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do; and the Court or judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined. But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who was out of the jurisdiction when

the writ was issued, and who has not appeared to the writ unless he has been made a party to the action under Order XI., or has been served within the jurisdiction after the writ in the action was issued.

No writ issued except on production of judgment.

Rule 11. No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment or order upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the creditor to execution.

Præcipe for writ of execution.

Rule 12. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firm against whose goods, the execution is to be issued; and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The Forms in Appendix G. shall be used, with such variations as circumstances may require.

How writ of execution to be indorsed.

Rule 13. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

Date and form of writ.

Rule 14. Every writ of execution shall bear date of the day on which it is issued. The Forms in Appendix H. shall be used, with such variations as circumstances may require.

Poundage, fees, and expenses.

Rule 15. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered.

Amount of money and interest to be recovered to be indorsed.

Rule 16. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment

or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4l. per cent. per annum from the time when the judgment or order was entered or made, provided that in cases where there is an agreement between the parties that more than 4l. per cent. interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interest so agreed.

Rule 17. Every person to whom any sum of money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of *fi. fa.* or one or more writ or writs of *elegit* to enforce payment thereof, subject nevertheless as follows :

Time to sue out *fi. fa.* or *elegit* to enforce payment of money or costs.

- (a) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period :
- (b) The Court or a judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit.

Rule 18. Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs, but a second writ shall only be for costs, and shall be issued not less than eight days after the first writ.

Separate writs may issue for money and costs.

Rule 19. A party who has obtained judgment or an order, not being a judgment for payment of money or costs, or for the recovery of land, may issue execution in fourteen days, unless the Court or a judge shall order execution to issue at an earlier or later date with or without terms.

Time for execution except for money and costs.

Rule 20. A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided ; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the Court ; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

Duration of writ.

Renewal.

Evidence of
renewal.

Rule 21. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

Execution to
issue within
six years.

Rule 22. As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order.

Application
for leave to
issue execu-
tion in certain
cases.

Rule 23. In the following cases, viz.:—

- (a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution ;
- (b) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife ;
- (c) Where a party is entitled to execution upon a judgment of assets *in futuro* ;
- (d) Where a party is entitled to execution against any of the shareholders of a joint-stock company upon a judgment recorded against such company, or against a public officer or other person representing such company ;

the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just.

Orders may
be enforced
like judg-
ments.

Rule 24. Every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect.

Order of
commitment
under Debtors
Act, 1869.

Rule 25. An order of commitment under the Debtors Act, 1869, shall bear date on the day on which such order was made, and shall continue in force for one year from such date and no longer ; but it may be renewed in the manner provided for writs of execution by Rule 20 of this Order.

Execution by
or against
person not a
party.

Rule 26. Any person not being a party to a cause or matter, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter ; and any

person not being a party to a cause or matter, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to such cause or matter.

Rule 27. No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or judge may give such relief and upon such terms as may be just.

Audita querela abolished.
Application to stay execution.

Rule 28. Nothing in this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

Saving of pre-existing mode of process.

Rule 29. Nothing in this Order shall affect the order in which writs of execution may be issued.

Order of issuing writs.

Rule 30. If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained, and costs.

Court may direct act to be done at expense of disobedient party.

Rule 31. Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property.

How judgment against corporation enforced.

Discovery in Aid of Execution.

Rule 32. When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or

Examination of judgment debtor as to debts owing to him.

order, before a judge or an officer of the Court as the Court or judge shall appoint; and the Court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents.

Court may order attendance, &c. of party, if difficulty in enforcing judgment.

Rule 33. In case of any judgment or order other than for the recovery or payment of money, if any difficulty shall arise in or about the execution or enforcement thereof, any party interested may apply to the Court or a judge, and the Court or judge may make such order thereon for the attendance and examination of any party or otherwise as may be just.

Costs of application under rr. 32 and 33.

Rule 34. The costs of any application under the last two preceding rules or either of them, and of any proceedings arising from or incidental thereto, shall be in the discretion of the Court or a judge, or in the discretion of such officer as in Rule 32 mentioned, if the Court or a judge shall so direct.

Ord. XLIII.

ORD. XLIII.—*WRITS OF FIERI FACIAS, ELEGIT, AND SEQUESTRATION.*

Effect, &c. of writs of *fi. fa.* and *elegit*.

Rule 1. Writs of *fi. facias* and of *elegit* shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed.

Writ of *venditioni exponas*.

Rule 2. Where it appears, upon the return of any writ of *fi. facias*, that the sheriff or other officer has by virtue of such writ seized, but not sold, any goods of the person directed to pay a sum of money or costs, the person to whom such sum of money or costs is payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas*.

Writs of *fi. fa. de bonis ecclesiasticis*, or sequestration.

Rule 3. Where it appears, upon the return of any writ of *fi. facias* or any writ of *elegit*, that the person against whom such writ was so issued is a beneficed clerk, and has no goods or chattels, nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writs of *fi. facias de bonis ecclesiasticis*, or one or more writs of sequestration.

Procedure thereon.

Rule 4. Such writs as in the last preceding rule mentioned,

when sealed, shall be delivered to the bishop to be executed by him, and such writs, when returned by the bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the Central Office; and for the execution of such writs the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority.

Rule 5. Writs of *renditioni exponas*, *distringas nuper vice comitem*, *fieri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore.

Writs in aid of *fi. fa.* or *elegit*.

Rule 6. Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had before the commencement of the principal Act, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery.

Sequestration enforcing payment into Court or any other act.

Rule 7. No *subpoena* for the payment of costs, and, unless by leave of the Court or a judge, no sequestration to enforce such payment, shall be issued.

No *subpoena* or, without leave, sequestration for costs.

ORD. XLIV.—ATTACHMENT.

Ord. XLIV.

Rule 1. A writ of attachment shall have the same effect as a writ of attachment issued out of the Chancery Division has heretofore had.

Effect of writ of attachment.

Rule 2. No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued.

Application for leave to issue.

ORD. XLVII.—WRIT OF POSSESSION.

Ord. XLVII.

Rule 1. A judgment or order that a party do recover possession of any land may be enforced by writ of possession in

Writ of possession for recovery of land.

manner before the commencement of the principal Act used in actions of ejectment in the Superior Courts of Common Law.

Writ issued on proving service of judgment and disobedience.

Rule 2. Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment or order and that the same has not been obeyed.

Separate writs for recovery of possession and costs.

Rule 3. Upon any judgment or order for the recovery of any land and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs at the election of the successful party.

Ord. XLVIII.

ORD. XLVIII.—*WRIT OF DELIVERY.*

Writ of delivery, when ordered.

Rule 1. Where it is sought to enforce a judgment or order for the recovery of any property other than land or money by writ of delivery, the Court or a judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property, upon paying the value assessed, if any, and that if the property cannot be found, and unless the Court or a judge shall otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff's bailiwick, till the defendant deliver the property; or at the option of the plaintiff, that the sheriff cause to be made of the defendant's goods the assessed value, if any, of the property.

Form of writ. Separate writ for damages, &c.

Rule 2. A writ of delivery shall be in the Form No. 10 in Appendix H.; and when a writ of delivery is issued, the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages and costs awarded, and interest.

Ord. LVII.

ORD. LVII.—*INTERPLEADER.*

In what cases relief by interpleader granted.

Rule 1. Relief by way of interpleader may be granted—

- (a) Where the person seeking relief (in this Order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this Order called the claimants) making adverse claims thereto:

- (b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued.

Rule 2. The applicant must satisfy the Court or a judge by affidavit or otherwise— What applicant must prove to Court.

- (a) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs: and
 (b) That the applicant does not collude with any of the claimants; and
 (c) That the applicant is willing to pay or transfer the subject-matter into Court or to dispose of it as the Court or a judge may direct.

Rule 3. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another. Adverse titles of claimants.

Rule 4. Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons. Time for application by defendant.

Rule 5. The applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them. Summons by applicant.

Rule 6. If the application is made by a defendant in an action the Court or a judge may stay all further proceedings in the action. Stay of action.

Rule 7. If the claimants appear in pursuance of the summons, the Court or a judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant. Order that claimant be made defendant, or that an issue be stated.

Rule 8. The Court or a judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just. Disposal in summary manner.

Rule 9. Where the question is a question of law, and the facts are not in dispute, the Court or a judge may either decide Questions of law.

Special case. the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. If a special case is stated, Order XXXIV. shall, as far as applicable, apply thereto.

Claimant not appearing, or neglecting to obey to be barred. Rule 10. If a claimant, having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or a judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

Order under Rule 8, to be final. Rule 11. Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way, under Rule 8 of this Order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal.

Order to sell goods seized in execution. Rule 12. When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.

Application of Ords. XXXI., XXXVI. to interpleader proceedings. Rule 13. Orders XXXI. and XXXVI. shall, with the necessary modifications, apply to an interpleader issue; and the Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for.

Title of order. Rule 14. Where in any interpleader proceeding it is necessary or expedient to make one order in several causes or matters pending in several divisions, or before different judges of the same division, such order may be made by the Court or judge before whom the interpleader proceeding may be taken, and shall be entitled in all such causes or matters; and any such order (subject to the right of appeal) shall be binding on the parties in all such causes or matters.

Orders as to costs, &c. Rule 15. The Court or a judge may, in or for the purposes of

any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable.

ORD. LXIX.—ARREST OF DEFENDANT UNDER SECT. 6 OF THE DEBTORS ACT, 1869. Ord. LXIX.

Rule 1. An order to arrest under the 6th section of the Debtors Act, 1869 (which shall be in the Form No. 31 in Appendix K., with such variations as circumstances may require), shall be made upon affidavit and *ex parte*; but the defendant may at any time after arrest apply to the Court or a judge to rescind or vary the order or to be discharged from custody, or for such other relief as may be just. Form of application and order to arrest.

Rule 2. An order to arrest shall before delivery to the sheriff be indorsed with the plaintiff's address for service as required by Order IV., Rules 1 and 2. Concurrent orders may be issued for arrest in different counties. The sheriff or other officer executing the order shall be entitled to the same fees as heretofore. Indorsement on order.
Sheriff's fees.

Rule 3. The security to be given by the defendant may be a deposit in Court of the amount mentioned in the order, or a bond to the plaintiff by the defendant and two sufficient sureties (or with the leave of the Court or a judge either one surety or more than two), or, with the plaintiff's consent, any other form of security. The plaintiff may, within four days after receiving particulars of the names and addresses of the proposed sureties, give notice that he objects thereto, stating in the notice the particulars of his objections. In such case the sufficiency of the security shall be determined by a master, who shall have power to award costs to either party. It shall be the duty of the plaintiff to obtain an appointment for that purpose, and unless he do so within four days after giving notice of objection the security shall be deemed sufficient. Security to be given by defendant.

Rule 4. The money deposited, and the security, and all proceedings thereon, shall be subject to the order and control of the Court or a judge. Control of Court over security, &c.

Rule 5. Unless otherwise ordered, the costs of and incidental to an order of arrest shall be costs in the cause. Costs of arrest.

Rule 6. Upon payment into Court of the amount mentioned in the order, a receipt shall be given; and upon receiving the bond or other security, a certificate to that effect shall be given, signed or attested by the plaintiff's solicitor if he have one, or by the plaintiff, if he sue in person. The delivery of such Discharge of defendant on payment and security.

receipt, or a certificate to the sheriff or other officer executing the order, shall entitle the defendant to be discharged out of custody.

Date of
arrest to be
indorsed.

Rule 7. The sheriff or other officer named in an order to arrest shall, within two days after the arrest, indorse on the order the true date of such arrest.

[And see Forms in the Appendices to above Rules so far as not set out in the various branches of this work.]

Practice under Crown Office Rules, 1886.

OUTLAWRY.

Outlawry
before judg-
ment.

Rule 99. To proceed to outlawry before judgment on an indictment for misdemeanor, or an information, the prosecutor must issue a writ of *venire facias* at the Crown Office returnable on a day certain either in or out of the sittings.

On non-
appearance
distringas or
capias may
issue.

Rule 100. On the return of the sheriff that he has summoned the defendant, and the defendant has not appeared, the prosecutor may issue a *distringas* to answer, returnable on a day certain either in or out of the sittings, and if necessary *alias* writs of *distringas*, and if the sheriff return that the defendant has no goods in his bailiwick whereby he can be summoned, or distrained, a *capias ad respondendum* tested, and made returnable as the writ of *venire facias*, may be issued on the fourth day after the return.

Issue of alias
and pluries
writs.

Rule 101. On the return of *non est inventus* to a *capias ad respondendum*, before the prosecutor can proceed further, he shall issue a second writ of *capias* on the fourth day after the return of the first, made returnable as the first writ, and shall issue a third writ of *capias* on the fourth day after the return of the second, tested and made returnable, as the second writ.

*Capias cum
proclamatione*
into foreign
county.

Rule 102. If the defendant is dwelling in another county than where the indictment was found, or where the information be laid, the prosecutor shall issue another second writ of *capias cum proclamatione* to the sheriff of the foreign county after the return of the first writ to the sheriff of the county in which the indictment was found, or information laid, tested as the other writs of *capias*, but not to be made returnable till such a day certain as will enable the sheriff of the foreign county, if he cannot be found, to make proclamation at two of his County

Courts either three months, or four months, after the issue of the writ according as the sheriff may hold his Courts from month to month, or six weeks to six weeks.

Rule 103. Upon a return of *non est inventus* to the third writ of *capias* in the same county, and if the defendant be dwelling in another county to the *capias* to the sheriff of such county, a writ of exigent must be issued by the prosecutor. Writ of exigent.

Rule 104. Simultaneously with the writ of exigent a writ of proclamations shall be issued to the sheriff of the county where the defendant is mentioned to be, or inhabit; both writs must be tested on the day of the return to the previous process, and returnable on such a day certain during the sittings as will admit of their being delivered to the sheriff three months before return. Writ of proclamations.

Rule. 105. If it does not appear by the return to the writ of exigent that the defendant has been exacted five times and outlawed, the prosecutor must issue another writ of exigent with allocatur, commanding the sheriff to cause him to be further exacted until he shall have been exacted five times and outlawed. Writ of exigent with allocatur.

Rule 106. Upon the return of the sheriff that the defendant has been exacted five times and outlawed, on application of the prosecutor judgment may be entered at the Crown Office. Entry of judgment.

Rule 107. After judgment has been entered, the roll of all the proceedings may be engrossed by the prosecutor, and filed at the Crown Office. Roll of proceedings.

Rule 108. A writ of *capias utlagatum* may be issued by the prosecutor at any time the defendant is likely to be found, or a like writ special, *cum breve de inquirendo*, or if necessary a writ of *melius inquirendum* may be applied for. *Capias utlagatum*, &c.

Rule 109. All the rules as to proceeding to outlawry on indictment in misdemeanor before judgment, shall apply to indictment for felony, except that in felony the prosecutor may issue a writ of *capias ad respondendum* at once, instead of a *venire facias* to answer. Application of rules to felony.

Rule 110. On proceeding to outlawry after judgment on indictment for felony or misdemeanor or information, the prosecutor may issue a writ of *capias ad satisfaciendum* into the county where the indictment is found, or information laid, returnable on the first day of the then next sittings. One writ of *capias* only need be issued, and on return of *non est inventus*, the prosecutor may issue a writ of exigent tested on the return Outlawry after judgment.

day of the writ of *capias*, returnable on the first day of the then next sittings. It shall not be necessary to issue any writ of proclamations on the return of a writ of *capias ad satisfaciendum*.

Application of rules to proceedings after judgment.

Capias utlagatum into Lancashire.

Rule 111. After the return to the writ of exigent, the rules as to proceeding after writ of exigent in outlawry before judgment shall apply to proceedings in outlawry after judgment.

Rule 112. In the county of Lancaster the *capias utlagatum* and all subsequent process shall be directed to the Chancellor of the Duchy.

REVERSAL OF OUTLAWRY.

Personal appearance.

Rule 113. It shall not be necessary for any person who shall be outlawed before conviction for any matter or thing except treason or felony to appear in person to reverse such outlawry, but such person may appear by solicitor and reverse the same.

Undertaking of solicitor to appear.

Rule 114. If any person outlawed otherwise than for treason, or felony, before conviction be taken and arrested upon any *capias utlagatum*, the sheriff may take a solicitor's engagement under his hand to appear for the defendant, and shall thereupon discharge the defendant from the arrest.

Bail and *supersedeas*.

Rule 115. If a defendant surrenders or is taken before outlawry is complete on misdemeanor before judgment, he may give bail in such amount, and with or without sureties, as a judge may direct, to appear to the indictment, inquisition, or information, and on appearance apply to the Court or a judge for a *supersedeas* to the process of outlawry.

Plea on reversal.

Rule 116. If a defendant comes in on an indictment or information for misdemeanor, and reverses the outlawry before judgment, he shall plead *instante*.

Committal on outlawry after judgment.

Rule 117. On an indictment or inquisition for felony, or in any case after judgment, a defendant who surrenders or is taken before the outlawry is complete, shall be committed to answer the indictment or inquisition or to satisfy the judgment, but may supersede the outlawry process.

Reversal after conviction.

Rule 118. To reverse outlawry after conviction the defendant shall surrender himself into custody, and afterwards be brought into Court to assign errors upon the judgment in outlawry, by *habeas corpus*.

Writ of error to reverse.

Rule 119. If the defendant be taken on a *capias utlagatum*, he shall deliver the writ of error into Court when he appears upon the return to the *capias*; he shall then move for an order to

bring him up again to assign errors, and shall be committed by the Court to the Queen's prison.

Rule 120. Until outlawry be reversed a defendant after conviction shall not be committed, or called up for judgment upon an indictment, information, or inquisition. No committal until reversal.

Rule 121. Upon the assignment of error in outlawry the prosecutor shall join in error within eight days, and the case may then be entered in the Crown paper for argument on the application of either party as in error to the Queen's Bench Division from inferior courts. Assignment of errors.

BAIL.

Rule 122. Applications for bail in felony or misdemeanor where the party is in custody shall be in the first instance by summons before a judge at chambers for a writ of *habeas corpus*, or to show cause why the defendant should not be admitted to bail either before a judge at chambers or before a justice of the peace, in such an amount as the judge may direct. Application for bail to be by summons.

SCIRE FACIAS.

Rule 127. No proceedings shall be taken in the Crown Office by *scire facias* upon recognizance. *Scire facias* abolished.

JURY.

Rule 158. Writs of *venire facias*, or other writs for the summoning of juries, shall no longer be used, but the jury, whether special or common, shall be taken from the list of persons summoned for the sittings or assizes, and a panel shall be annexed to the record as in civil cases. Either the prosecutor or the defendant may, except in case of felony, obtain a special jury upon giving the like notice as is required in civil cases, and the Court or a judge may, at the instance of either party, order that a special jury be struck as provided for by "The Juries Act, 1870." And when the jury has been reduced either party may draw up an order at the Crown Office directing the sheriff to summon that particular jury at such time and place as may be required. How obtained.

VIEW.

Rule 159. Upon any application for a view there shall be an affidavit stating the place at which the view is to be made, and Costs of view.

the distance thereof from the office of the under-sheriff, and the sum to be deposited with the under-sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed five miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the solicitor of the party who obtained the view. If such sum shall not be sufficient to pay such expenses the deficiency shall forthwith be paid by such solicitor to the under-sheriff, and the under-sheriff shall pay and account for the money so deposited, according to the scale at the end of the Appendix to these Rules.

EXECUTION.

Application
of Ord. XLII.
of R. S. C.,
1883.

Rule 217. Order XLII. of the Rules of the Supreme Court, 1883 (Execution), shall, as far as it is applicable, apply to all civil proceedings on the Crown side.

The following Rules shall apply to all criminal proceedings on the Crown side:—

Attachment
or committal.

Rule 218. A judgment or order requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.

Præcipe.

Rule 219. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the proceeding and the date of the judgment or order on which it is founded, the names of the parties against whom the execution is to be issued, and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing if he do so in person.

Endorsement
on writ of
execution.

Rule 220. Every writ of execution shall be endorsed with the name and place of abode, or office of business, of the solicitor actually suing out the same; and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall be indorsed upon the writ, and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the party in person, mentioning the city, town or parish, and also the name of the hamlet, street, and number of the house of such residence, if any such there be.

Rule 221. Every writ of execution shall be made returnable immediately after the execution thereof. Return to writ.

Rule 222. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution over and above the sum recovered. Poundage, &c.

Rule 223. Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff or other officer or person to whom the writ is directed to levy the money really due and payable and sought to be recovered, with interest at the rate of 4l. per cent. per annum from the time (when the judgment was entered up) or from the date of the order. Interest.

Rule 224. Every person to whom any sum of money or any costs shall be payable under a judgment shall immediately after the time when the judgment was duly entered be entitled to sue out one or more writ or writs of *fi. facias*, or one or more writs of *elegit* to enforce payment thereof. *Fi. fa.* or *elegit*.

Rule 225. Every order of the Court or a judge in any cause or matter may be enforced in the same manner as a judgment to that effect. Orders, how enforced.

Rule 226. A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect and be entitled to priority according to the time of the original delivery thereof. Duration of writ.
Renewal.

Rule 227. The production of a writ of execution or the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed. Evidence of renewal.

Rule 228. Writs of *fi. facias* and of *elegit* shall have the same force and effect as the like writs have heretofore had, except that a writ of *elegit* shall no longer extend to the goods of the debtor, and shall be executed in the same manner in which the like writs have heretofore been executed. Effect of *fi. fa.* and *elegit*.

WRITS.

Where
issued.

Rule 229. All writs on the Crown side shall be issued at the Crown Office Department of the Central Office.

Preparation
of writs.

Rule 230. Every writ shall be prepared by the solicitor or party suing out the same, and shall be written or printed on parchment. Every writ shall, before being sealed, be indorsed with the name and address of such solicitor or party; and, if sued out by the solicitor as agent, with the name and address of the principal solicitor also. With the exception of writs of *subpœna ad testificandum*, all writs issued at the Crown Office shall be entered in a book to be there kept for the purpose.

Teste of
writs.

Rule 231. Every writ, except as hereinafter by these rules provided, shall bear date on the day on which the same shall be issued, and shall be tested at the Royal Courts of Justice, London, in the name of the Lord Chief Justice of England.

When
returnable.

Rule 232. Every writ, unless by these rules otherwise provided, issued by the Queen's Bench Division, when returnable in Court, shall be made returnable forthwith in such division; and such of the aforesaid writs as may be made returnable at chambers, shall be made returnable forthwith before a judge at chambers, unless otherwise ordered: provided that every writ of *habeas corpus ad subjiciendum* shall be made returnable immediately.

Order to
return writs.

Rule 233. Every order to return a writ shall require such return to be made within four days next after service of such order, if served in London or Middlesex, and within eight days in all other cases. Every writ returnable in Court shall, together with the return thereto, be filed in the Crown Office, and every writ returnable before a judge shall, after the decision of the judge thereon, be so filed, with the return and any order made thereon or a copy of such order; provided that any writ of *certiorari* to remove inquisitions and depositions taken before a justice of the peace, or a coroner, upon the commitment of any person charged with any offence, shall, as soon as the Court or a judge shall have exercised their or his discretion thereon, be transmitted to the clerk of assize or clerk of the peace or other officer (as the case may be) of the county, borough, or place from which they have been received.

Writs to
compel
appearance.

Rule 234. Every writ to compel an appearance shall require the appearance to be entered in the Crown Office on a day

certain, and in case no appearance shall be entered at the end of four days, exclusive of the return day thereof, further process may issue to compel an appearance, which further process shall be tested on the return day of the previous process; and every writ of *capias ad satisfaciendum* shall have eight days at least between such *teste* and return.

HABEAS CORPUS.

A.—*Ad subjiciendum*.

Rule 235. An application for a writ of *habeas corpus ad subjiciendum* may be made to the Court or a judge. Application for writ.

Rule 236. If made to the Court the application shall be by motion for an order, which if the Court so direct may be made absolute *ex parte* for the writ to issue in the first instance; or if the Court so direct they may grant an order *nisi*. When made to Court.

Rule 237. If made to a judge he may order the writ to issue *ex parte* in the first instance, or may direct a summons for the writ to issue. When made to judge.

Rule 238. Provided that no application for a writ of *habeas corpus* on a warrant of extradition shall be made to a judge at chambers during the sittings. In extradition cases.

Rule 239. The writ of *habeas corpus* shall be served personally, if possible, upon the party to whom it is directed; or if not possible, or if the writ be directed to a gaoler or other public official, by leaving it with a servant or agent of the person confining or restraining, at the place where the prisoner is confined or restrained, and if the writ be directed to more than one person, the original delivered to or left with such principal person, and copies served or left on each of the other persons in the same manner as the writ. Service of writ.

Rule 240. If a writ of *habeas corpus* be disobeyed by the person to whom it is directed, application may be made to the Court on an affidavit of service and disobedience for an attachment for contempt. In vacation an application may be made to a judge in chambers for a warrant for the apprehension of the person in contempt to be brought before him, or some other judge, to be bound over to appear in Court at the next ensuing sittings, to answer for his contempt, or to be committed to the Queen's prison for want of bail. Disobedience to writ.

Rule 241. The return to the writ of *habeas corpus* shall Return to writ.

contain a copy of all the causes of the prisoner's detainer indorsed on the writ, or on a separate schedule annexed to it.

Amendment
of return.

Rule 242. The return may be amended or another substituted for it by leave of the Court or a judge.

Proceedings
in Court on
return.

Rule 243. When a return to the writ of *habeas corpus* is made, the return shall first be read, and motion then made for discharging or remanding the prisoner, or amending or quashing the return.

Discharge of
prisoner with-
out return.

Rule 244. On the argument of an order *nisi* for a writ of *habeas corpus*, the Court may in its discretion direct an order to be drawn up for the prisoner's discharge, instead of waiting for the return of the writ, which order shall be a sufficient warrant to any gaoler or constable or other person for his discharge.

Order to be
drawn up and
writ, return,
&c. to be
filed.

Rule 245. Upon the argument before the Court on the return of a writ of *habeas corpus*, the party in whose favour judgment is given shall forthwith draw up an order in accordance with the decision of the Court at the Crown Office, and the writ, and return, and affidavits shall be filed there. When the order has been made by a judge at chambers, the writ, and return, with the affidavits and a copy of the judge's order, shall be forthwith transmitted to the Crown Office to be filed.

B.—Other Writs of *Habeas Corpus*.

Application
for.

Rule 246. Applications for writs of *habeas corpus ad testificandum*, *ad respondendum*, or *ad deliberandum* and *recipias*, must be made on affidavit to a judge at chambers.

Order to
bring up
prisoner as
witness.

Rule 247. An application to bring up a prisoner to give evidence on any cause or matter civil or criminal before any Court, justice, or other judicature may be made to a judge, on affidavit for an order.

Writs *ad
deliberandum
and recipias*.

Rule 248. An application for *habeas corpus ad deliberandum* and *recipias* shall be for two writs, the writ *ad deliberandum* to the gaoler to deliver the prisoner, and the writ *recipias* to the other gaoler to receive him.

Order of
hearing
counsel.

Rule 249. When a prisoner is brought up by *habeas corpus* the counsel for the prisoner shall be first heard, and then the counsel for the Crown, and then one counsel for the prisoner in reply.

ATTACHMENT FOR CONTEMPT.

Rule 261. An application for an attachment for contempt shall be by motion for an order *nisi*. The service of an order *nisi* for an attachment shall be personal. Application for.

Rule 262. Every writ of attachment for contempt shall be made returnable in the Queen's Bench Division on a day certain during the sittings. In case of a return of *non est inventus* thereon, one or more writs may issue tested on the return day of the previous writ. When returnable.

Rule 263. If the sheriff returns *cepi corpus*, on application at the Crown Office, an order shall be drawn up for a writ of *habeas corpus* to issue to bring in the body of the defendant. *Habeas corpus* on return of *cepi corpus*.

Rule 264. When the defendant is brought before the Court on the attachment, a motion may be made by the prosecutor, or if he does not make it, by the defendant, that he may be sworn to answer such questions or interrogatories as may be put to him by the prosecutor, and must give such bail to answer them before the Queen's coroner and attorney, or the Master of the Crown Office, as the Court may think fit, and for the Master to proceed to examine the matter and report to the Court thereon. Interrogatories.

Rule 265. In default of bail the defendant shall be committed to the Queen's prison, but if at any time after he be prepared to give it, he may be brought before the Court or a judge on an order on the person in whose custody he is, which order shall be drawn up on application at the Crown Office for that purpose. Committal to prison in default of bail.

Rule 266. On the defendant being sworn an order may be drawn up at the Crown Office, and served on the prosecutor to file interrogatories within four days after the service thereof. If no interrogatories are filed at the end of the fourth day, on obtaining a certificate from the Queen's coroner and attorney, or Master of the Crown Office to that effect, the defendant shall be discharged out of custody by an order of the Court or a judge. Order to file interrogatories.

Rule 267. The answers to the interrogatories shall be signed by the defendant and also acknowledged by him before any commissioner to administer oaths in the Supreme Court of Judicature. Answers to interrogatories.

Rule 268. On an intimation to one of the parties that the Master is prepared with his report, a motion may be made on a Master's report.

four days' notice to be served on the other party, that the Master on a day certain do make his report to the Court.

Defendant to be present on Master's report.

Rule 269. The defendant shall be present in Court on the Master's report being made; if he be in the Queen's prison under process from the High Court, an order may be drawn up on application at the Crown Office for the governor of the Queen's prison to bring him into Court; but if he be in custody in any other prison, or under process from any other Court, the order shall be for a writ of *habeas corpus*, which order may be drawn up in like manner and such writ issued thereon.

Notice to defendant to appear on report.

Rule 270. If the defendant be out on bail, the prosecutor shall, if possible, give notice to the defendant and his bail that the defendant is required personally to attend the Court on the report, and that if he does not so attend the Court will be moved to estreat the recognizance.

Defendant in contempt.

Rule 271. If the defendant be reported in contempt, the Court after hearing the parties on the report may either pronounce sentence at once or commit him to the Queen's prison until some future day for that purpose, when an order shall be drawn up at the Crown Office directing the governor of the Queen's prison to bring the defendant into Court.

Procedure on sentence.

Rule 272. On proceeding to sentence, affidavits in mitigation or aggravation may be read, and the defendant or his counsel heard, and the prosecutor's counsel be heard in reply.

Order for sentence.

Rule 273. If the defendant be sentenced to imprisonment, the order for sentence shall be lodged with the gaoler of the prison to which he is committed.

Costs when defendant not guilty.

Rule 274. If the defendant is reported not to be in contempt, the Court may order him and his recognizances to be discharged, and with costs if the Court shall be of opinion that the prosecutor's complaint was groundless, and the attachment vexatious.

Counsel to sign interrogatories.

Rule 275. All interrogatories in writing on attachments shall be signed by counsel.

Disallowance of irrelevant questions.

Rule 276. It shall be lawful for the Queen's coroner and attorney or the Master of the Crown Office to disallow any question or interrogatory that he considers irrelevant or otherwise improper.

DE CONTUMACE CAPIENDO—EXCOMMUNICATO CAPIENDO.

Writ to be opened, &c. in open Court.

Rule 277. On a writ of *de contumace* or *de excommunicato capiendo* being issued, it shall be handed to the Queen's coroner

and attorney, or Master of the Crown Office (in open Court during the sittings, to be opened and indorsed and sent to the Crown Office) and the prosecutor's solicitor may then apply at the Crown Office for the writ and shall lodge it with the sheriff for execution.

Rule 278. On a return by the sheriff that he has taken the defendant, an application may be made to the Court on behalf of the defendant, for an order *nisi* to set aside the proceedings for irregularity or insufficiency, or for a writ of *habeas corpus* to bring up the defendant to be discharged for the want of sufficiency in the writ. Application to set aside.

Rule 279. If the sheriff returns *non est inventus* the prosecutor may issue a writ of *capias super contumace capiendo* with a penalty of 10*l.*, which shall be tested on the return day of the *contumace capiendo* and made returnable two months after the *teste*. If return be made to the writ of *capias* that the defendant has not yielded himself to prison, an alias writ of *capias* with an increased penalty of 20*l.* may be issued by the prosecutor in like manner, and so on until the defendant has yielded himself to custody, where he shall remain without bail or mainprize as if he had been taken on the original writ. *Capias super contumace capiendo.*

ARTICLES OF THE PEACE.

Rule 280. An application for leave to exhibit articles of the peace in the Queen's Bench Division, and for an attachment thereon, shall be made *ex parte* to a Divisional Court by motion for an order absolute in the first instance. Application for leave to exhibit.

Rule 281. Upon the motion being made the exhibitant shall be sworn or affirmed to the truth of the articles by the Master in Court, and the articles shall then be handed in and read by him. Exhibitant to be sworn in Court.

Rule 282. The writ of attachment shall be issued from the Crown Office, and may be directed to the sheriff of any county in which the defendant may be found, and shall be made returnable on a day certain. Writ of attachment.

Rule 283. After the return day on application at the Crown Office the prosecutor may obtain an order to return the writ. Order to return writ.

Rule 284. On a return of "*non est inventus*" the subsequent proceedings shall be the same as provided by the rules on attachment for contempt up to capture. Proceedings on return of *non est inventus*.

Habeas corpus
on return of
cepi corpus.

Rule 285. On a return of *cepi corpus*, an order for the issuing a writ of *habeas corpus* to bring in the body may be obtained by the prosecutor by application at the Crown Office.

Motion for
security for
the peace.

Rule 286. On the sheriffs bringing in the body counsel may move that the defendant be ordered to find security for the peace.

Mitigation.

Rule 287. On the motion for security the articles must be read in the presence of the defendant in Court, and the defendant may file affidavits in mitigation and be heard by himself or counsel upon them, or upon the articles, but may not contradict the truth of the matters stated in the articles.

The recog-
nizance.

Rule 288. The amount and conditions of the recognizance and period during which the security shall extend must be settled by the Court itself, and if the defendant is unable to find bail the prosecutor must draw up an order for his committal to the Queen's prison until he finds the required bail.

Bringing up
defendant
upon finding
bail.

Rule 289. Upon finding the required bail the defendant, on application on his behalf at the Crown Office, may obtain an order to bring up the defendant either before the Court or a judge at chambers to enter into the recognizance and obtain his discharge.

Certiorari to
remove
articles.

Rule 290. To remove articles of the peace originally exhibited at the assizes, or sessions of the peace, in order that an attachment may be issued upon them, an order for a writ of *certiorari* as of course may be obtained by the prosecutor on application at the Crown Office.

Application
by defendant
for *certiorari*.

Rule 291. An application on behalf of a defendant for a writ of *certiorari* to remove articles of the peace originally exhibited at the assizes or sessions of the peace to quash the articles, and if the defendant be in custody for a writ of *habeas corpus* to bring up and discharge him or his recognizance, shall be made to a Divisional Court by motion for an order *nisi*.

Proceedings
on the
argument.

Rule 292. On the argument of the order the Court will either discharge the defendant and his recognizance or commit him to the Queen's prison until he find the required bail as if the articles had been originally exhibited in the Queen's Bench Division.

Procedure generally as to the Issue of Warrants and Execution of Writs.

“When a writ is directed to the sheriff it should, after it has been issued, be taken to the sheriff or deputy sheriff’s office, with instructions to give a warrant for its execution to the officer, if any, whom you wish to execute it. In a county palatine writs are delivered to the sheriff in the same way as in other counties. It is no part of the duty of a sheriff’s officer to receive writs for execution from the parties, and a clerk of the sheriff’s officer has no authority to receive a writ.” 14th ed. Chit. Archb. Practice of the Queen’s Bench, p. 807; and see authorities there quoted as to a solicitor’s liability to the sheriff for giving wrong directions, whereby goods of a third person are seized. The above mode of delivery of writs for execution also applies to writs on the Crown side.

Delivery of writ for execution

To further quote the above work—“The sheriff himself, when the writ is directed to him, may personally execute it, and so may his under-sheriff, without warrant; but to enable any other party to do so, there must be a warrant directed to him from the sheriff for that purpose. The warrant is an order from the sheriff to his officer to execute the writ, so that the sheriff may obey the order of the Court as contained in it. It would seem that the warrant should be in writing. The person to whom this warrant is directed is in general a bound bailiff, that is, a bailiff usually bound with sureties in an obligation for the due execution of his office. But it may be directed to a special bailiff nominated by the execution creditor or his solicitor. The warrant should be directed to the officer who is to execute the writ; but it seems that it may be directed to the chief bailiff of a liberty and his deputies, as there may be known deputies within the franchise, and the sheriff may make them his bailiffs without further describing them. A variance between the writ and warrant will not, it seems, affect the validity of the execution of the writ. The warrant need not specify the Court out of which the writ issued.” A sheriff should not issue blank warrants, and the warrant should not be altered after it is issued. “The sheriff must not make out the warrant until he has the writ in his actual possession. If he does, and the writ be executed, he will be subject to an action, and the execution will be invalid. The warrant should be delivered to the officer to whom it is directed. It may be delivered to him on a Sunday. He

The warrant.

Contents of warrant.

Should not be issued in blank nor altered after issue. Not to be made before sheriff has received writ.

is not justified in executing the writ before the warrant is delivered to him."

Party named
in warrant
should
execute the
writ.

"The officer named in the warrant should execute the writ. It is not necessary, however, that the officer to whom the warrant is directed should be the person who actually executes the writ, or even be within sight when it is executed; but he must be *acting* in its execution; he cannot go upon another business, or stay at home and send a third person to execute it." (See forms of warrant under the various writs.)

Writ when,
where, and
how executed,
when directed
to sheriff.

"It is the duty of the sheriff to execute the writ when directed to him within a reasonable time after he receives it for execution, and if he omits doing so an action may be maintained against him by the party suing out the writ; but in order to sustain such action in the case of *fi. fa.*, actual damage arising from the neglect must be proved. In the case of *ca. sa.*, it appears such action would lie without any proof of actual damage (*a*). The sheriff is also liable to attachment if he omit to execute the writ. If the sheriff has several writs in his hands against the same person, he is bound to execute them all, giving priority to each in the order in which they came into his hands." (See also "Writ of *Fieri Facias*" and "Writ of *Elegit*," *post*, pp. 63, 113.) "But though the sheriff has a reasonable time for executing the writ, that does not excuse him in refusing to execute it when he has the opportunity, if required to do so, and nothing occurs to prevent him; and therefore, for such a refusal, an action may also be supported against him. The writ, when directed as above, may be executed at any time before it is returnable, and while it is in force." (As to how long a writ of execution remains in force, see R. of S. C. 1883, Ord. XLII. rr. 20 and 21, *ante*, pp. 25, 26.) "If the writ be made returnable on a particular day, it may be executed at any time of such day." (As to the time when it may be executed, see under titles "Writ of *Fieri Facias*" and "Arrest," *post*, pp. 62, 176.) "If a bailiff execute a writ before it comes to the sheriff's hands, or before the warrant is made on it, the bailiff is a trespasser. The sheriff should not execute the writ after it has been countermanded, otherwise he will be liable in trespass" (*b*).

When
executed.

(*a*) But according to the same authority (14 Chit. Archb.) actual damage must be proved in the case of an order to arrest.

(*b*) Moreover, notice from the plaintiff's solicitor to the bailiff charged

Procedure against Sheriffs, &c. for not Executing Writs.

“It seems clear in the general reason of the law—which gives all Courts of Record a kind of discretionary power over all abuses by their own officers in the administration or execution of justice, which bring a disgrace on the Courts themselves, as not taking sufficient care to prevent them—that, whenever it shall appear that any such officers have been guilty of any corrupt practice in not serving any writ—as where they refuse to do it unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects in order to prevent the service of any writ—the Court which awarded it may punish such offences in such manner as shall seem proper by attachment, &c. . . . But if there neither appears to be any palpable corruption in the case nor particular obstinacy, as by disobeying a special rule of the Court in relation to the service of such writ, nor other extraordinary circumstance of wilful negligence, the judgment whereof is to be left to the discretion of the Court, it seems not to be usual to grant an attachment in such cases, but to leave the party to his ordinary remedy against the officer.” *Hawkins’ Pleas of the Crown*, vol. 2, c. 22, s. 2.

Procedure
against
sheriffs, &c.
for not exe-
cuting writs.

As to the sheriff’s liability for delay in putting a writ of execution in force, see *Clifton v. Hooper*, 6 Q. B. 468; 14 L. J. Q. B. 1; *Hughes v. Rees*, 4 M. & W. 468; *White v. Chapple and Others*, 4 C. B. 628; 16 L. J. C. P. 233; *Jupp v. Cooper*, 5 C. P. D. 26; *Chapman v. Maddison*, 2 Str. 1089; *Reg. v. Sheriff of Cornwall*, in *Hemming v. Tremera*, 7 D. P. C. 606, and *Wilton v. Chambers*, 1 H. & W. 582; see also *In re Bryant*, 4 Ch. D. 98; *Ex parte Langley*, *Ex parte Smith*, *In re Bishop*, 13 Ch. D. 110; and *Re v. Middlesex (Sheriff)*, 1 D. P. C. 53. A sheriff who has exercised reasonable diligence in the execution of a writ is not, however, liable to an action because he did not use extraordinary exertion, or provide against an unexpected and unforeseen contingency. *Hodgson v. Lynch*, 5 Ir. R. C. L. 353, C. P.

Sheriff’s li-
ability for
delay in exe-
cuting writ.

Moreover, so long as a judgment exists it protects those who

with a warrant under a *ca. sci.* that it is withdrawn is sufficient to render the latter liable for an arrest; and, *semble*, is notice to the sheriff (*Fletcher v. Hinder*, 28 L. J. (N. S.) Exch. 28; 3 H. & N. 757).

seize the property under an execution founded on it, and if the judgment and execution are set aside no action can be maintained against the sheriff for anything he did under such judgment while it remained in existence. *Ives v. Lucas*, 1 C. & P. 7.

And see under title "Appointment of Sheriff and his Officers (Bailiffs and Franchises)," *ante*, pp. 13, 18, and under title "Liability and Rights of Sheriff and Remedies against Sheriff," *post*, pp. 493 *et seq.*

CHAPTER IV.

WRIT OF FIERI FACIAS.

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Introductory.

THE writ of *fi. facias* is a writ of execution against the goods and chattels of the party against whom the judgment is recovered, and is the first of the writs of execution enumerated in Ord. XLII. r. 8 of the Rules of Supreme Court, 1883. See Ord. XLII., especially Rules 8 and 17, and the Crown Office Rules, 1886, r. 224, in the preceding Chapter; and see also 13 Edw. I. (Writ Sec.), st. 1, c. 18. It derives its name from the words of the writ "*quod fieri facias de bonis*," and directs the sheriff to levy on the goods and chattels of the judgment debtor. It therefore differs from the writ of *elegit*, under which the sheriff takes the lands and hereditaments of the judgment debtor, as to which, see *post*, p. 99.

Issue of more
than one writ.

The execution creditor is entitled, under Rule 224, Crown Office Rules, 1886, to issue more than one writ of *fi. fa.*, and so may issue writs to the respective sheriffs of different counties concurrently; but he must be careful to avoid double execution (*Lee v. Dangar*, [1892] 1 Q. B. 231; affirmed 8 T. L. R. 494; [1892] 2 Q. B. 337; 61 L. J. Q. B. 780; 66 L. T. 548; 40 W. R. 469; 56 J. P. 678); and see the subject discussed *post*, p. 63, under the sub-heading "Several Writs."

Separate writs
may be issued
for debts and
costs.

It will be observed that Rule 18 of Ord. XLII. provides that "Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs, but a second writ shall only be for costs, and shall be issued not less than eight days after the first writ." The object of this rule appears to be to enable the judgment creditor to issue execution immediately after obtaining judgment, without

waiting for taxation of costs. *Harris v. Jewell*, W. N. (1883) 216.

The writ should be delivered to the sheriff for execution, and not to the sheriff's officer, as it is no part of the duty of the latter to receive writs. *Triminger v. Keen*, W. N. (1882) 106, before Jessel, M. R., and Lindley, L. J.

Rule 15 of Ord. XLII. enables the party entitled to execution to levy poundage, fees, and expenses of execution over and above the sum recovered. See *post*, under the heading "Sheriff's Fees, &c." Expenses of execution.

Rules 20 and 21 provide for renewal of writ. See *ante*, p. 25. Sheriffs must be careful not to execute writs more than a year old without evidence of renewal. Renewal of writ.

By Rule 22, "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment, or the date of the order" (*a*). Execution to issue within six years.

Rule 14 requires every writ to bear date of the day on which it is issued. Date of writ.

Forms of Writ.

1. *Writ of Fieri Facias* (Form No. 1, App. H. of R. S. C. 1883).

18 . [*Here put the letter and number.*]

In the High Court of Justice,
Division.

Between A. B. . . . Plaintiff,
and

C. D. . . . Defendant.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of . . . greeting :

We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ . . . , and also interest thereon at the rate of £ . . . per centum per annum from the . . . day of . . . , which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*], wherein A. B. is plaintiff and C. D. defendant [*or in a certain matter there depending intituled "In the matter of E. F.," as the case may be*], by a judgment [*or order, as the case may be*] of our said Court, bearing date the . . . day of . . . , adjudged [*or ordered, as the case may be*] to be paid by the said C. D. to A. B., together with certain costs in said judgment [*or order, as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing officers of our said Court at the sum of £ . . . , as appears by the certificate of the said

(*a*) There is a similar provision in Rules 226 and 227 of the Crown Office Rules, 1886.

taxing officer, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ [costs], together with interest thereon at the rate of £4 per centum per annum from the day of , and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said A. B. in pursuance of the said judgment [*or order, as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof, and have there then this writ.

Witness, &c.

2. *Fieri Facias on Judgment removed from Lord Mayor's Court* (Form No. 15, App. H. of R. S. C. 1883).

[*Heading as in Form 1.*]

VICTORIA, by the grace of God, &c. To the Sheriff of greeting :

Whereas by the judgment of the Mayor's Court of London, signed on the day of , 18 , it has been adjudged that the said recover against the said £ and £ costs.

And whereas by the Mayor's Court of London Procedure Act, 1857, any writ of execution upon the final judgment obtained in the Mayor's Court is directed to be sealed in any of the Superior Courts, and it is declared that thereupon such writ of execution or judgment shall become and be of the same force, charge, and effect as a writ of execution or judgment recovered in such superior Court, and that all the reasonable costs and charges attendant upon such sealing shall be recovered in the same manner as if the same were part of such judgment.

And whereas the costs attendant upon sealing the writ of execution herein in our High Court of Justice have been allowed at the sum of £1 : 6s. 0d.

Therefore we command you, that of the goods and chattels of the said in your bailiwick, you cause to be made the said several sums, with interest thereon, at the rate of £4 per centum per annum, from the said day of , 18 , and that you have that money and interest before us in our said Court immediately after the execution hereof, to be rendered to the said . And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof, and have there then this writ.

Witness, &c.

Levy £ and £ for costs of execution, &c., and also interest on £ at £4 per centum per annum from the day of , 18 , until payment; besides sheriff's poundage, officer's fees, costs of levying, and all other legal incidental expenses (*b*).

This writ was issued by of , agent for , solicitor for the .

The is a and resides at in your bailiwick.

(*b*) As to "incidental expenses," see *Hutchinson v. Humbert*, 10 L. J. (N. S.) Exch. 413; 8 M. & W. 638; 1 Dowl. P. C. (N. S.) 78.

3. *Writ of Fieri Facias on Order for Costs* (Form No. 138 of C. O. R. 1886).

VICTORIA, by the grace of God, &c. To the Sheriff of greeting:

We command you that of the goods and chattels of A. B. in your bailiwick, you cause to be made the sum of £ for certain costs which by an order of the Queen's Bench Division of Our High Court of Justice, dated the day of , 18 , were ordered to be paid by to , and which have been taxed and allowed at the said sum, as appears by the allocatur of one of the taxing masters, together with interest on the said sum at the rate of £4 per centum per annum from the day of , 18 (c), and that you have the said money before Us in Our said Court immediately after the execution hereof to be rendered to the said for his costs as aforesaid. And how you shall have executed this Our writ then and there make known to Us in Our said Court immediately after the execution thereof, and have then there this Our writ.

Witness, &c.

(To be indorsed.)

Levy £ and £ for costs of execution, &c., and also interest on £ at £4 per centum per annum, from the day of , 18 , until payment, besides sheriff's poundage, officer's fees, costs of levying and all other legal incidental expenses.

This writ was issued by M. N., of L., agent for G. H., of Y., solicitor for who resides at .

The within-named A. B. is a , and resides at in your bailiwick.

4. *Writ of Fieri Facias on Judgment with Order for Costs*(d) (Form No. 139, C. O. R. 1886).

VICTORIA, by the Grace of God, &c. To the sheriff of greeting:

We command you that of the goods and chattels of in your bailiwick you cause to be made the sum of , and also interest thereon, at the rate of £4 per centum per annum from the (c) day of , 18 , which said sum of money and interest were lately before Us, in the Queen's Bench Division of Our High Court of Justice, in a certain (e) wherein A. B. is the prosecutor [or as the case may be] and C. D. the defendant, by a (f) of Our said Court, bearing date the day of , 18 (g), to be paid by the said to for costs in the said (f) mentioned, and which costs have been taxed and allowed at the sum of , as appears by the allocatur of one of the taxing-masters, dated the day of , 18 . And that you have that money and interest before Us in Our said Court

(c) Date of judgment or order.

(d) This writ must be so moulded as to follow the substance of the order or judgment.

(e) Indictment, information (in the nature of a *quo warranto*), action of mandamus, or matter there depending, intituled "In the Matter of," &c., or as the case may be.

(f) "Judgment" or "order."

(g) "Adjudged," "awarded," or "ordered."

immediately after the execution hereof, to be paid to the said in pursuance of the said (*h*) . And in what manner you shall have executed this Our writ, make known to Us in Our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

(*Indorsement as in No. 3.*)

5. *Writ of Fieri Facias on an Order of Quarter Sessions removed into the Crown Side of the Queen's Bench Division* (Form No. 140, C. O. R. 1886).

VICTORIA, by the Grace of God, &c. To the sheriff of greeting:
We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of (£50) for certain costs which, by an order of the general quarter sessions of the peace holden in and for the said county of on the day of made in a certain appeal, wherein A. B. was appellant, and the said C. D. was respondent, were adjudged to be paid by the said C. D. to the said A. B., and which order of quarter sessions was afterwards, on the day of , removed into the Queen's Bench Division of Our High Court of Justice by virtue of an order of the Honourable Mr. Justice , made the day of , 18 , in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal were, on the day of , 18 , taxed and allowed at the sum of (£9), as appears by the allocatur of one of the taxing masters dated the day of , 18 . And We further command you that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of (£9) together with interest at the rate of £4 per centum per annum from the said day of (*i*), and that you have that money and interest before Us in Our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said orders. And in what manner you shall have executed this Our writ make known to Us in Our said Court immediately after the execution thereof, and have then there this writ.

Witness, &c.

6. *Writ of Fieri Facias for a Fine* (Form No. 145, C. O. R. 1886).

VICTORIA, by the Grace of God, &c. To the sheriff of greeting:
We command you that of the goods and chattels, lands and tenements of A. B., you cause to be levied pounds, imposed upon him in the Queen's Bench Division of Our High Court of Justice before him for his fine, for certain whereof he is impeached (*or* indicted), and thereupon, by a certain jury of the country (*or* by his own default, *or* confession), he stands convicted, as in Our Court before Us it appears upon record. And that you have the said

(*h*) "Judgment" or "order."

(*i*) The date of the order.

money before Us in Our said Court immediately after the execution thereof to satisfy Us for the said fine, and that you then have there this writ.

Witness, &c.

7. *Writ of Fieri Facias against a Married Woman (j).*

VICTORIA, &c.

We command you that of the goods and chattels of A. B. (being her separate property not subject to any restriction against anticipation as hereinafter mentioned) in your bailiwick, you cause to be made the sum of £ and £ costs, and also interest thereon at the rate of £ per centum per annum from the [date of judgment], which said sums of money and interest were lately before Us in Our High Court of Justice in a certain action [or matter] there depending, wherein [parties' names] by a judgment of Our said Court bearing date the , adjudged to be paid by the said A. B. to out of her separate property not subject to any restriction against anticipation (unless by reason of section 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction), and that you have that money, &c. [as in the first Form].

Indorsements on the Writ of Execution.

Under the Statute of Frauds (29 Car. II. c. 3), sect. 16, it is the duty of the sheriff, under-sheriff, and coroners, and their deputies and agents, upon the receipt of any writ of execution (without fee for doing the same), to indorse upon the back thereof the day of the month and year whereon they received the same. The reason for this enactment is that the writ binds the goods of the debtor from the date of its delivery to the sheriff for execution.

Sheriff, &c. to indorse writ with date of delivery.

For the same reason, sect. 10, sub-sect. 1, of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), further provides that "a sheriff, at the request of a person delivering a writ to him for execution, shall give a receipt for that writ, stating the day of its delivery."

Sheriff to give receipt for writ, if required.

To enable sheriffs and their officers to ascertain whether writs delivered to them for execution are regular on the face of them,

(j) The form of this writ, for which the author is indebted to the Annual Practice for 1894, is drawn up from the form of judgment settled by the Court of Appeal in *Scott v. Morley*, 20 Q. B. D. 132; 57 L. J. Q. B. 43; 57 L. T. 919; 36 W. R. 67; 52 J. P. 230.

the Rules of the Supreme Court dealing with the indorsements are set out, but, except as to indorsing the date of delivery, it is no part of the duty of a sheriff or his officers to add to, alter, or amend the writ or its indorsements in any way whatever.

Indorsement
on writ of
execution.

By Rule 13 of Ord. XLII., "Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be." By Rule 14, "Every writ of execution shall bear date of the day on which it is issued." By Rule 16, "Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per cent. per annum from the time when the judgment or order was entered or made; provided that, in cases where there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interest so agreed."

Amount of
money and
interest to be
recovered to
be indorsed.

A *fi. fa.*, whereby the sheriff is directed to levy a sum different in amount from that mentioned in the judgment, although smaller, is irregular, unless the reason of the variance is shown on the face of the writ. *Webber v. Hutchins*, 8 M. & W. 319; 1 D. N. S. 95.

The date from which the interest runs must be filled in. As to what is the proper date, see *Boswell v. Coaks*, 57 L. J. Ch. 101; *Pyman v. Burt*, W. N. (1884) 100.

Liability of
execution
creditor and
his solicitor
for mistake in
filling up
indorsement.

It is desirable that the writ should also be indorsed with a description of the judgment debtor and his place of abode. It is the duty of the solicitor for the judgment creditor to fill up the form in this respect; should he do so incorrectly, and thereby mislead the sheriff, he and his client will be liable for

the consequences. In *Lee v. Rumilly* (55 J. P. 519; 7 T. L. R. 303), Kay, L. J., said that it was quite settled that it was the duty of the execution creditor to fill up the indorsement form attached to the writ, and that for any mistake in filling up the indorsement, which misled the sheriff, where the mistake was made by the solicitor of the execution creditor, not only the solicitor, but the execution creditor, was liable. But it is no part of the solicitor's duty to interfere with the sheriff in the performance of his duty, as, for example, by giving verbal directions, or directions as to the ownership of particular goods, and for such conduct on the part of the solicitor, his client will not be held responsible, unless he has expressly authorized it. *Smith v. Keal*, 9 Q. B. D. 340. "Now, it is clear it is no part of his (*i. e.*, the solicitor's) duty to interfere with the sheriff in the performance of his duty. It is the sheriff's duty to levy execution on the goods of the judgment debtor. If, therefore, the solicitor interferes, and directs the sheriff to levy on the goods of another person, he is answerable on the same principle as anyone else who directs a trespass. Though the sheriff is an officer of the law, he is liable if he commits a trespass, and anyone who joins in the trespass is equally liable." *Per Jessel, M. R.*, at p. 351 of the report of *Smith v. Keal*, 9 Q. B. D.

In all cases, whether the solicitor and his client are liable or not, the sheriff is liable for any trespass he may commit, unless he protects himself by interpleader proceedings, as to which see under title "Interpleader," *post*, p. 378.

The following cases bear upon this subject:—

Father and son bore the same name, and a *fi. fa.* was issued against the son, without the addition of the words "the younger." The sheriff levied on the goods of the father, who brought an action for trespass against the sheriff and the judgment creditor. It was held that, though the father was *primâ facie* intended, such *primâ facie* intendment might be rebutted, and the sheriff made liable by showing that the judgment was obtained, and the writ issued, against the son, and further that the judgment creditor was liable, his attorney having wrongly indorsed the writ. *Jarmain v. Hooper*, 7 Scott, N. R. 663; 1 D. & L. 769; 13 L. J. C. P. 63.

A lodged with the sheriff a *fi. fa.*, in the indorsement of which the execution debtor was described as of a place at which he carried on business in partnership with others. Held, that by

the indorsement A. had directed the sheriff to levy on the goods at that place. *Lane v. Sterne*, 10 W. R. 555.

The defendant issued execution against one Law, and delivered the writ to the sheriff, whose officer, doubting about the goods, requested and obtained an interview with the managing clerk of the defendant's solicitor. The latter informed the officer that he believed Law had a share in a brewery, which was the address indorsed on the writ, and that the officer had better seize there; he did so, and took goods belonging to the plaintiff, who brought this action against the defendant, the judgment creditor, for trespass. The plaintiff was nonsuited on the ground that the managing clerk had no implied authority to give these instructions, and therefore that what he had done did not bind the defendant. *Smith v. Keal*, 9 Q. B. D. 340.

The defendant, having recovered judgment in an action against one G. M. M., his solicitor, indorsed on a writ of *fi. fa.*, directing the sheriff to levy the amount of the judgment upon the goods of G. M. M., a statement that the execution debtor resided at a certain address, which, however, was not the address of such execution debtor, but that of his father, G. M. The sheriff seized the goods of G. M., the father. In an action brought by G. M. against the defendant, the execution creditor, in respect of such seizure, the jury found that the sheriff seized the goods of the plaintiff instead of those of G. M. M., the son, because he was misled by the direction he received from the solicitor of the defendant. Held, that upon such finding the defendant was liable in respect of the wrongful seizure of the goods. *Morris v. Salberg*, 22 Q. B. D. 614.

The defendant having recovered judgment against Mrs. C., his solicitor indorsed on a writ of *fi. fa.* a statement that Mrs. C. resided at a certain address. The address, however, was really that of the plaintiff, whose business Mrs. C. managed. The sheriff having seized the plaintiff's goods at the address given, the defendant was held liable. *Lee v. Rumilly*, 7 T. L. R. 303; 55 J. P. 519.

The defendant having recovered judgment against R. C., directed the sheriff to levy the amount on the goods of R. C. at his place of business. Before the judgment R. C. had by bill of sale assigned these goods to the plaintiff as security for money lent. The sheriff seized the goods, and on an interpleader issue it was found that some of the goods belonged to R. C. In an action for trespass to goods, it was held that, as there was nothing

untrue in the directions in the indorsement on the writ given by the defendant to the sheriff so as to mislead him, the action was not maintainable against the defendant. *Condy v. Blaiberg*, 7 T. L. R. 424; 55 J. P. 580.

If *Childers v. Wooler* (2 El. & E. 287; 29 L. J. Q. B. 129) is inconsistent with *Jarmain v. Hooper* and *Morris v. Salberg*, it must be considered as overruled, but it may, perhaps, be supported on other grounds. See *per* Lord Esher, M. R., in *Morris v. Salberg*. And see under this head, *Humphreys v. Pratt*, 2 Dow. & Cl. 288; 5 Bli. N. S. 154; in connection with which see *per* Tenterden, C. J., Clark's Index, 306, and also *Rowles v. Senior*, 8 Q. B. 677.

Warrant.

On receipt of a writ of *fi. fa.* the sheriff by warrant directs his officers to seize.

Warrant to be issued on receipt of writ.

Form of Warrant.

——— to wit: S. S., Esq., sheriff of the said county, to and my bailiffs, greeting: By virtue of a writ of our Sovereign Lady the Queen to me directed and delivered, bearing date the day of in the year of our Lord one thousand eight hundred and , I command you and every of you jointly and severally that of the goods and chattels of C. D. in my bailiwick you or one of you cause to be made the sum of £ and also interest thereon at the rate of £ per centum per annum from the day of , 18 , which said sum of money and interest were lately before our said Sovereign Lady the Queen in her Majesty's High Court of Justice in a certain action [or "certain actions," as the case may be] wherein A. B. is plaintiff and C. D. is defendant, by a judgment of the said Court bearing date the day of , 18 , adjudged to be paid by the said C. D. to A. B., together with certain costs in the said judgment mentioned, and which costs have been taxed and allowed by one of the taxing officers of the said Court at the sum of £ , as appears by the certificate of the said taxing officer dated : And I further command you that of the goods and chattels of the said C. D. in my bailiwick you further cause to be made the sum of £ [costs], together with interest thereon at the rate of £ per centum per annum from the day of , 18 [let all this follow the terms of the writ of *fi. fa.*], so that I may have that money and interest before her said Majesty in her High Court of Justice, immediately after the execution hereof, to be paid to the said A. B. as required by the said writ, and that you do all such things as by the statute passed in the second year of the reign of Queen Victoria I am authorized and required to do this in this behalf. And in what manner you shall have executed

this warrant certify to me immediately after the execution hereof. Hereof fail not.

Given under the seal of my office the day of , A.D.
By the sheriff.

(Seal of Office.)

Writ indorsed: Levy £ &c., [copying the indorsement on the writ]. Before you levy on the goods and chattels of the defendant, beware that he is not an ambassador, or servant to an ambassador, or otherwise privileged or protected.

Time of Execution.

Time of
execution.

By 29 Car. II. c. 7, s. 6, "No person or persons upon the Lord's day shall serve or execute, or cause to be served or executed, any writs, process, warrant, order, judgment, or decree (except in cases of treason-felony or breach of the peace), but the service of every such writ, process, warrant, order, judgment, or decree shall be void to all intents and purposes whatsoever: and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, warrant, order, judgment, or decree at all." But where a *fi. fa.* had been executed on a Sunday, and the execution had been *abandoned* the next day, it was held that an entry on the following Thursday to execute a distress warrant was not invalid. *Percival v. Stamp*, 9 Ex. 167; 23 L. J. Exch. 25, *per* Parke, B. "The same rule does not apply to the case of a sheriff seizing goods after an illegal entry as holds with respect to a sheriff who, in the first instance, arrests a party illegally and then detains him under a legal warrant."

Whilst a landlord can only distrain during the daytime, there is no such limitation imposed with respect to the sheriff. *Brown v. Glenn*, 16 Q. B. 254, *per* Lord Campbell, C. J., 20 L. J. (N. S.) Q. B. 205.

A writ may be executed the day it is returnable, but not after. *Parkins v. Wollaston*, 6 Mod. 130; and see *Maud v. Barnard*, 2 Burr. 812.

A sheriff's officer, having a *fi. fa.* against A., called at his house when he was from home, waited till he returned, and then informed him of his business:—Held, that there was

sufficient evidence to warrant the jury in finding that the writ was executed at the time of the officer's entry. *Bird v. Bass*, 6 Man. & G. 143; 6 Scott, N. R. 928.

Place of Execution.

It is the duty of the sheriff to levy on the goods of the debtor wherever found within his bailiwick. This word was introduced by the princes of the Norman line in imitation of the French, whose country is divided into bailiwicks, as that of England into counties. It bears the same meaning. See Blackstone, Bk. I., c. 9.

Place of execution.
Origin of term
"bailiwick."

Detached parts of counties are to be treated as parts of the counties by which they are surrounded. 7 & 8 Vict. c. 61, s. 1.

Royal residences have the privilege of exemption from the execution of legal process. This privilege is based solely on the principle that the personal dignity and comfort of the Sovereign should not be interfered with; and though actual personal residence is not necessary to confer it, the privilege does not extend to the precincts of a palace such as that of Hampton Court, the occupation of which has been clearly and unequivocally abandoned. *Att.-Gen. v. Dakin*, L. R. 4 H. L. 338; 39 L. J. Ex. 113; 23 L. T. N. S. 1.

Exemption of
royal resi-
dences from
execution of
legal process

With regard to franchises, see under title "Appointment of Sheriff and his Officers (Franchises, &c.)," *ante*, p. 18; and sect. 34 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55).

Franchises.

Several Writs—Priority of Execution.

Where a sheriff has several writs issued by different creditors against the same debtor, it is his duty to execute that writ first which was first delivered to him, and when he has sold sufficient to satisfy that writ, he should sell under the next in order, and so on, as long as there are goods unsold. If there remain writs unexecuted when all the goods are sold, he should pay the amounts of the several writs in order of priority of time, and make a return of *nulla bona* to the unsatisfied writs. *Aldred v. Constable*, 6 Q. B. 370; and *In re Pearce, Ex parte Crossthwaite*, 14 Q. B. D. 966; 54 L. J. Q. B. 316.

Priority of
execution of
several writs.

Seizure under one writ enures for the benefit of all (*Jones v. Atherton*, 2 Marsh. 375; 7 Taunt. 56), provided that the sub-

sequent writs were delivered into the sheriff's hands before he sold the goods. *Harrison v. Paynter*, 6 M. & W. 387; 8 Dowl. P. C. 349; 9 L. J. (N. S.) Ex. 169.

Where an attorney, acting for several plaintiffs in different actions, delivered seven writs of *fi. fa.* to the sheriff in one bundle at the same time:—Held, that the sheriff could not call upon the plaintiffs or their attorney to say which writs were to have priority. *Semble*, that a return to the effect that he had received the writs at the same time, and had levied under all, would be a good return. *Ashworth v. The Earl of Uxbridge*, 12 L. J. (N. S.) Q. B. 39; 2 Dowl. N. S. 377.

Where two writs of *fi. fa.* against the same defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first must have priority, notwithstanding seizure be first made under the subsequent execution. *Hutchinson v. Johnston*, 1 T. R. 729; 1 R. R. 380.

All feigned,
covinous, and
fraudulent
judgments
to be void.

The statute 13 Eliz. c. 5 enacts, *inter alia*, that all feigned, covinous, and fraudulent judgments and executions, devised and contrived with intent to delay, hinder, or defraud creditors and others, shall be, as against those persons, utterly void. Accordingly, a fraudulent writ must be postponed to the next writ in order of delivery. *Bradley v. Windham*, 1 Wils. 44. There is nothing in this statute to prevent a debtor preferring one creditor to another, though the others have commenced actions against him, and though he does so with intent to defeat the other creditors. *Wood v. Dixie*, 7 Q. B. 892; *Hale v. Saloon Omnibus Co.*, 4 Drew. 492.

Where goods, seized under a former writ, founded on a judgment fraudulent against creditors, are capable of being seized by the sheriff, he is compellable, under 13 Eliz. c. 5, to seize and sell such goods under a writ received by him subsequently, and founded on a *bonâ fide* debt; and if, after notice of such fraud, he neglects to sell, and returns *nulla bona* to the latter writ, he is liable to an action for a false return. Nor does the fact that the sheriff has assigned the goods upon the prior execution to a supposed *bonâ fide* purchaser (but who is in truth a party to the fraud), innocently and in ignorance of the fraud, excuse the sheriff from such liability. *Christopherson v. Burton*, 3 Exch. 160; 18 L. J. Exch. 60.

Where a *fi. fa.* is delivered to the sheriff, with directions to suspend the execution, and in the meantime another writ is delivered by another creditor, the sheriff is bound to levy under

the latter writ in preference to the former, although the former writ was not delivered with any fraudulent intent or purpose to protect the goods of the debtor. *Hunt v. Hooper*, 1 D. & L. 626; 12 M. & W. 664; 13 L. J. Ex. 183; and see *Kempland v. Macauley*, 1 Peake, 95; and *Crowder v. Long*, 8 B. & C. 598.

In March the then sheriffs of London seized the goods of a debtor by virtue of a *fi. fa.*; an officer was put in possession of the goods, but the execution creditor directed the sheriffs not to sell, and the debtor continued to have the control of his goods until November, when another execution creditor sued out a *fi. fa.*, directed to the succeeding sheriffs of London:—Held, that the latter were bound to levy this second *fi. fa.*, and that it was their duty, when they found the officer of the former sheriffs in possession, to inquire into the facts, and if they had done so, they would have learned that the first execution was fraudulent. *Lorick v. Crowder*, 8 B. & C. 132; 2 M. & R. 84.

“When a writ against the goods of a party has issued from the High Court, and a warrant against the goods of the same party has issued from a County Court, the right to the goods seized shall be determined by the priority of the time of the delivery of the writ to the sheriff to be executed, or of the application to the registrar for the issue of the warrant to be executed; and the sheriff, on demand, shall, by writing signed by any clerk in the office of the under-sheriff, inform the high bailiff of the precise time of such delivery of the writ, and the bailiff on demand shall show his warrant to any sheriff’s officer, and such writing, purporting to be so signed, and the indorsement on the warrant, shall respectively be sufficient justification to any high bailiff or sheriff acting thereon.” 51 & 52 Vict. c. 43 (County Courts Act, 1888), s. 152.

Priority of executions issuing out of High Court and County Court.

See also as to priority of writs, *Wintle v. Lord Chetwynd*, 7 Dowl. P. C. 554; *Chambers v. Coleman*, 9 Dowl. P. C. 588; and *Saunders v. Middlesex (Sheriff)*, 3 B. & A. 95. See also under this head *Imray v. Magnay*, *post*, p. 93, under sub-heading “Reporting Result of Execution, &c.”

Concurrent Writs.

A judgment creditor is entitled to sue out concurrent writs of *fi. fa.*, in order to obtain execution in the several counties in which his debtor has goods, and each sheriff is bound by the

When judgment creditor may sue out concurrent writs.

writ to seize the goods of the judgment debtor within his bailiwick. It matters not whether one seizure be after another or not. The judgment creditor should give the sheriffs notice of the other writs, and both he and the sheriffs must be careful to avoid allowing a sale to take place under more than one writ when one seizure would satisfy the debt. The creditor, acting under this power, must act reasonably and without malice. *Lee v. Dangar*, [1892] 1 Q. B. 226; affirmed 8 T. L. R. 494; [1892] 2 Q. B. 337; 61 L. J. Q. B. 780; 66 L. T. 548; 40 W. R. 469.

Successive Writs.

It appears that a judgment creditor cannot issue a second writ of *fi. fa.* (at least after an actual levy) until the first is returned. See *Chapman v. Bowlby*, 8 M. & W. 249; and *dicta* of Cave, J., in *Ex parte Ford*, 18 Q. B. D. 371, and Denman, J., in *Lee v. Dangar*, [1892] 1 Q. B. 240.

On this subject see also *Green v. Elgie*, 3 B. & Ad. 437; *Hunt v. Passmore*, 2 D. P. C. 414.

Seizure.

Amount to
be seized.

Claim of
landlord for
rent.

It is the duty of a sheriff in executing a *fi. fa.* to possess himself of all the goods of the debtor within his bailiwick, or sufficient to satisfy the execution. *Pitcher v. King*, D. & M. 584; 5 Q. B. 758. Under the statute 8 Anne, c. 14, s. 1, the sheriff must also levy arrears of rent, not exceeding one year's rent, if the landlord give him notice that the rent is in arrear, and should he remove any goods without securing this, he will be liable to the landlord. In other words, the duty of a sheriff, in the first instance, is to seize so much of the debtor's goods as will be reasonably sufficient, if sold, to satisfy the sum indorsed on the writ, and the proper poundage, fees, and expenses of execution, and his duty to seize in respect of rent does not arise until the landlord has made a claim, when, on the refusal of the tenant to pay the rent, the sheriff is bound to levy it under the writ, and, consequently, to seize to a larger amount. *Gawler v. Chaplin*, 2 Ex. 503; 18 L. J. Ex. 42. This claim by the land-

lord need not be formal ; it is sufficient if he informs the sheriff of the amount of the arrears. *Waring v. Derby*, 1 Stra. 97 ; *Colyer v. Speer*, 2 Brod. & B. 67 ; *Smith v. Russell*, 3 Taunt. 400.

The statute 8 Anne, c. 14, s. 8, contains a saving clause for Crown debts. Crown debts ; 7 & 8 Vict. c. 96, s. 67, provides for terms of less than one year. And see the subject discussed at length in the chapter on "Landlord's Claim for Rent."

So long as a judgment exists, it protects those who seize the property under an execution founded on it ; and if the judgment and execution are set aside, no action can be maintained against the sheriff for anything he did under such judgment while it remained in existence. *Ives v. Lucas*, 1 C. & P. 7. For the law regarding the liability of sheriffs for not executing or delaying the execution of writs, see under title "Sheriff's Rights and Liabilities and Remedies against Sheriff," *post*, p. 496.

Parties seizing protected so long as judgment exists.

In all cases when the door is open, the sheriff may enter the house, and do execution, at the suit of any subject, either of the body or of the goods. Fourth resolution in *Semayne's Case*, 1 Sm. L. C. ; 5 Co. 91.

How far sheriff empowered to enter and break houses.

In all cases when the king is party, the sheriff, if the doors be not open, may break the party's house either to arrest him, or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming and to make request to open the doors. (Third resolution.) But it was resolved that it is not lawful for the sheriff, on request made and denial, at the suit of a common person, to break the defendant's house to execute any process at the suit of any subject. (Fourth resolution.) It was further resolved that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law ; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there ; and, therefore, in such cases, after denial on request made, the sheriff may break the house. (Fifth resolution.)

Thus a sheriff may enter the judgment debtor's house, if he can do so without breaking in, but he may only break in to

execute a writ of *fi. fa.* when the Crown is a party. He may enter the house of a third party, but it is at his own risk, for if the goods of the defendant are not there, he is a trespasser and liable to an action. He may also break into the house of a third party if the debtor's goods have been taken there to avoid execution, but, again, he does so at his own risk. It appears there is no distinction between the house in which a judgment debtor resides with another person and his own house; Lord Loughborough, in *Shears v. Brooks*, 2 H. Bl. 120; 3 R. R. 357, says, "I see no difference between a house of which he is solely possessed, and a house in which he resides with the consent of another." That, however, was a case of bail seeking their principal. See also *Morrish v. Murray*, 13 M. & W. 52, and *Cooke v. Birt*, 5 Taunt. 764. If this is so, it follows that a sheriff cannot justify breaking into such a house. In all cases, before breaking in, it should be noted that a previous demand for admission and refusal thereof is necessary. *Semayne's Case*, and *Launock v. Brown*, 2 B. & A. 592. On the authorities it is doubtful whether lifting the latch of a door that is only latched amounts to breaking; in an American case, it was held that it did. See the notes to *Semayne's Case* in Smith's L. C., Vol. I., and cases on breaking under the heading "Burglary" in Archbold's Criminal Cases. If a window be shut, but not fastened, it may not be opened for the purpose of distraining. *Nash v. Lucas*, L. R. 2 Q. B. 590. It appears that though a sheriff who breaks into the debtor's house is a trespasser, yet the execution is good so far as relates to the goods seized. *Semayne's Case*; *De Gondouin v. Lewis*, 10 Ad. & E. 117, and see the question discussed in the notes to *Semayne's Case* in Smith's L. C.

If after having obtained peaceable possession of a dwelling-house, the sheriff's officers be forcibly ejected or be obliged to fly under threat of bodily injury, they may forcibly re-enter, and, in such cases, the sheriff can send as many additional officers as he may deem necessary; whilst in the case of such threat of bodily injury, the sheriff's officers should also summon the offender for assault. Again, where the sheriff, having obtained peaceable possession, cannot carry away the seized effects or execute the writ without breaking the lock, &c. of the outer door because of its being locked, &c., and neither the execution debtor nor anyone on his behalf are on the premises to enable the sheriff to request them to open such door, he is justified in breaking it open. *Pugh v. Griffiths*, 7 Ad. & E. 827; 3 N. & P.

187; 7 L. J. (N. S.) Q. B. 169; and see *Eagleton v. Gutteridge*, 11 M. & W. 465.

The sheriff may, if necessary, break open the outer door of a barn or out-house detached from a dwelling-house, without a previous demand and refusal of admission, for the purpose of executing a *fi. fa.* *Penton v. Browne*, 1 Sid. 186. It would, moreover, seem clear from the judgment of Blackburn, J., in *Hobson v. Thelluson*, 36 L. J. (N. S.) Q. B. 302, that a sheriff has a right to break open the door of a warehouse. Whilst a sheriff must always make request before breaking in, having entered by the open doors of a house, he can break open its inner doors for the purpose of executing a writ of *fi. fa.* without the necessity of making any previous demand to have such inner doors opened to him (*Hutchinson v. Birch*, 4 Taunt. 619; and *Johnson v. Leigh*, 1 Marsh. 565; 6 Taunt. 246); as also cupboards, trunks, &c., if necessary. *R. v. Bird*, 2 Show. 87; *Lee v. Gansell*, Cowp. 1; and *Hutchinson v. Birch*, *ante*.

Under a *fi. fa.* against the goods of an intestate in the hands of his administratrix, or of the husband of the administratrix in her right since her marriage, the sheriff may justify entering the house of the husband to search for goods of the intestate, though none are found therein, because that is the most natural place of custody for them. *Cooke v. Birt*, 5 Taunt. 764; 1 Marsh. 333. And see under this head, *Brunswick (Duke) v. Slowman*, 8 C. B. 317; 18 L. J. C. P. 299; and 1 Smith's L. C. 9th ed., pp. 122 *et seq.*; see also under title "Arrest," *post*, p. 177.

Whilst one man and at most three men are generally sufficient for adequate possession of the effects on any particular premises, it is in the discretion of the sheriff to place as many men in possession as he may deem necessary. In the case of an actual or apprehended breach of the peace in connection with an execution, the sheriff can call out the *posse comitatus* to prevent any such breach, and also to generally protect his officers in the discharge of their duties; and it has been held that a sheriff is not liable for damage to seized goods destroyed by means which he could not prevent; for example, through a mob breaking in and injuring the goods, notwithstanding the sheriff having taken reasonable precautions for the protection thereof. *Willis, Winder & Co. v. Coombe*, 1 C. & E. 353.

It was, moreover, held, in such latter case, that inasmuch as a bankruptcy receiver was in possession at the time of the sheriff taking possession and of the disturbance, the sheriff's possession

As to number of men to be placed in possession.

Posse comitatus.

was of such a nature that he could not be fixed with liability for the damage in question.

The sheriff is not obliged to remove all persons from the premises in question in the case of a *fi. fa.* as in the case of a writ of possession.

A sheriff cannot turn a tenant out of possession when he has taken a term under an execution against the landlord. *Rumball v. Murray*, 3 T. & R. 298; and see *Miller v. Parnell*, 2 Marsh. 78; 6 Taunt. 670.

Effectual and continuous possession should be secured, otherwise the sheriff incurs great risk. For an example of this, where a sheriff's officer executed a *fi. fa.* by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table, and saying "I take this table," and then locked up his warrant in the table drawer, took the key, and went away without leaving any person in possession, and after the *fi. fa.* was returnable, but not continued, the landlord distrained the goods for rent:—Held, that the sheriff could not maintain trespass against him. *Blades v. Arundale*, 1 M. & S. 711; and see under sub-title "Withdrawal from Possession," *post*, p. 81.

A seizure of part of the goods in a house by virtue of a *fi. fa.* in the name of the whole is a good seizure of all. *Cole v. Davies*, 1 Ld. Raym. Cases, p. 725.

A sheriff is liable in trespass for remaining an unreasonable time on the premises in possession of the seized goods. *Ash v. Dawney*, 8 Exch. 237; 22 L. J. Ex. 59; and see *Playfair v. Musgrove*, 14 M. & W. 239; 15 L. J. Ex. 26.

What Seizable and not Seizable.

Generally the sheriff may seize all, or so much as may be necessary, of the goods and chattels of the judgment debtor, including money, bank notes, and securities for money, and leasehold interests in land (but excluding wearing apparel, bedding, and tools to the value of 5*l.*), debts, equitable interests in leaseholds, and to some extent farming stock and crops. See these subjects treated of in detail in the following pages.

In *Bagge v. Whitehead*, [1892] 2 Q. B. 355; 61 L. J. Q. B. 778; 66 L. T. 815; 40 W. R. 472; 56 J. P. 548, it was held

that a sheriff was not liable to the penalty imposed by the Sheriffs Act, 1887, for having improperly seized bedding and tools, the penalty in that Act being imposed on the person actually guilty of the wrongful act.

All process, whereby the goods and chattels of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the Sovereign, or their domestic servants, may be seized, is void by 7 Anne, c. 12, s. 3, and also highly penal by sect. 4.

(1) Goods of ambassadors, &c., non-seizable.

A secretary of legation acting in the absence of the ambassador as chargé d'affaires is entitled to the privileges of an ambassador. *Taylor v. Best*, 14 C. B. 487. The domestic servants are not protected, unless they are registered as required by sect. 5 of the Act, and their names hung up in a public place in the offices of the sheriffs of London and Middlesex, whereto all persons may resort and take copies. No merchant or trader, within the description of any of the statutes against bankrupts, is protected by taking service under an ambassador. Sect. 5. It should be observed that consuls are not protected.

Domestic servants of ambassador to be registered.

By 1 & 2 Vict. c. 110, s. 12, "By virtue of any writ of *fieri facias* to be sued out of any superior or inferior court, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the governor and company of the bank of England or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects such writ of *fieri facias* shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount by such writ of *fieri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the

(2) Money, bank notes, &c., sheriff empowered to seize;

and to pay money or bank notes to execution creditor;

and to sue for amount secured by bills of exchange and other securities.

Proviso as to
indemnity for
sheriff.

extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided, that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action." The effect of this section is to make money, bank notes, &c., liable to seizure in the same way as other goods and chattels; but they do not on seizure vest in the execution creditor.

The balance of sale moneys in a sheriff's hands after satisfying two former executions constitutes a debt from him to the execution debtor, and as a mere debt it cannot be taken in execution under the above statute. *Harrison v. Paynter*, 6 M. & W. 387. But in *O'Neill v. Cunningham*, 6 Ir. C. L. 503, Q. B., it was held that money realized by a sale under a *fi. fa.* may be attached in the hands of the sheriff. Nor does the above Act empower seizure in execution of money in the hands of a third person as trustee for the debtor. *France v. Campbell*, 6 Jur. 105; and see *Brown v. Perrott*, 4 Beav. 585. Moreover, the above section only applies to the case of money set apart and earmarked as property specifically of the execution debtor; and, accordingly, money, levied under a *fi. fa.* and in the hands of the sheriff for an execution creditor, cannot be seized under a *fi. fa.* against such execution creditor. *Wood v. Wood*, 3 G. & D. 532; 4 Q. B. 397; 12 L. J. Q. B. 141; and *Collingridge v. Paxton*, 21 L. J. (N. S.) C. P. 39; 11 C. B. 683; and see on this subject, *Brun v. Hutchinson*, 13 L. J. (N. S.) Q. B. 244; 2 Dowl. & L. P. C. 43; as also *Winter v. Campbell*, 9 Dowl. P. C. 914; *Watts v. Jeffreys*, 3 Mac. & G. 372; 15 Jur. 435; 20 L. J. (N. S.) Ch.

659; *Courtoy v. Vincent*, 15 Beav. 486; 21 L. J. Ch. 291; and *Bell v. Hutchison*, 8 Jur. 895.

The wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade (the value of such apparel, bedding, tools and implements not exceeding in the whole the value of five pounds), shall not be liable to seizure under any execution or order of any Court against his goods and chattels. 8 & 9 Vict. c. 127, s. 8.

(3) Execution debtor's actual necessities not over 5*l.* in value non-seizable.

See also as to soldiers' accoutrements, Army Act, 1881 (44 & 45 Vict. c. 58); and as to rolling stock and plant of railways, see Railway Companies Act, 1867 (30 & 31 Vict. c. 127), and *post*, p. 236, under title "Execution against Companies."

(4) Soldiers' accoutrements.

(5) Railway rolling stock and plant.

The sheriff may realize the execution debtor's qualified property in hired goods. If, however, a party has goods on hire for a term, and the sheriff seizes them under an execution against such party, the owner of the goods may maintain an action against the sheriff if he sells the entire property of such goods; but to support the action, he must show that as soon as the goods were seized, he apprised the sheriff that the goods were lent for a term only, in order that the sheriff might know that he had only a right to sell the debtor's qualified property therein. *Dean v. Whittaker*, 1 C. & P. 347; and *Ward v. Macaulay*, 4 Durn. & E. Rep. 489. And see *Duffil v. Spottiswoode*, 3 C. & P. 435; *Panton v. Robart*, 2 East, 88; 4 Esp. 33; and *Pain v. Middlesex (Sheriff)*, R. & M. 99; as also *Lancashire Waggon Co. v. Fitzhugh*, 6 H. & N. 502; 30 L. J. Ex. 231. And an action against the sheriff for selling the reversionary interest of the plaintiff in goods in an execution debtor's possession cannot be supported, unless actual damage has been sustained. *Tancred v. Allgood*, 4 H. & N. 438; 28 L. J. Ex. 362.

(6) Goods on hire, how far seizable.

Where the execution debtor is or stands in the position of a mere bailee of goods during pleasure, and the owner has therefore an immediate right of possession therein, the latter may maintain trover against a sheriff who takes them in execution. See *Manders v. Williams*, 4 Exch. 339; 18 L. J. Exch. 437; and in particular the judgment of Parke, B., therein.

(7) Goods in possession of execution debtor as a bailee.

Under an execution against the goods of A., the sheriff cannot seize goods which he has deposited with another person as security for a debt. *Rogers v. Kenney*, 9 Q. B. 592; 11 Jur. 14; 15 L. J. Q. B. 381.

(8) Execution debtor's goods in pledge, non-seizable.

And see under title "Bills of Sale," *post*, p. 291.

(9) Pawn-broker's interest in redeemable pledges, seizable.

A pawnbroker's interest in redeemable pledges may be taken in execution under a *fi. fa.* *In re Rollason, Rollason v. Rollason, Halse's Claim*, 34 Ch. D. 495; 56 L. J. Ch. 768; 35 W. R. 607; 56 L. T. 303.

10) Effects in possession of execution debtor in a representative capacity, non-seizable.

Effects vested in another in a representative capacity cannot be taken in execution for his own debt except under special circumstances.

As executor of testator.

Goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right. *Farr v. Newman*, 4 T. R. 621; 2 R. R. 479. *Whale v. Booth*, 4 Doug. 36, cannot be accepted as an authority to the contrary, and may probably be explained in the way suggested by Grove, J., in *Farr v. Newman*. But if an executor uses the goods of the testator as his own, they will not be protected. See *Quick v. Staines*, 1 Bos. & Pul. 293; 2 Esp. 57; 4 R. R. 801; *McLeod v. Drummond*, 17 Ves. 152; and *Ray v. Ray*, Coop. 264; *Fenwick v. Laycock*, 1 G. & D. 532; 2 Q. B. 108; 11 L. J. Q. B. 146; and see also Lewin on Trusts, 8th ed. p. 224.

Where an executor carries on his testator's business under a power, and in so doing incurs debts, these debts are the personal debts of the executor, and judgment and execution must be against his personal property and not against the testator's. *In re Morgan*, 18 Ch. D. 93; 50 L. J. Ch. 834; *In re Evans*, 34 C. D. 597; 56 L. T. 768; 35 W. R. 44; *Douse v. Gorton*, [1891] A. C. 190; 60 L. J. Ch. 745; 64 L. T. 809. Where an executor before probate by his agent took the goods and carried on the business of the deceased, and judgment was recovered against the agent as executor, and a *fi. fa.* issued thereunder directing the sheriff to levy on the goods of the deceased in his hands as executor, the sheriff was not justified, as against the executor, in seizing goods of the deceased in such agent's hands. *Sykes v. Sykes*, L. R. 5 C. P. 113; 39 L. J. C. P. 179; 22 L. T. 236.

As administrator of intestate.

Goods of an intestate taken possession of and used by an administrator in the house of the intestate for three months after the death of the intestate, cannot be taken in execution for the administrator's own debt. *Gaskell v. Marshall*, 1 M. & Rob. 132.

As trustee.

Formerly *at law* trust property was liable to be taken for the debts of the trustee, but now under sects. 24 and 25 of the Judicature Act, 1873, the rules of equity prevail, and it is not

so liable. *Duncan v. Cashin*, L. R. 10 C. P. 554; 44 L. J. C. P. 225; *Engleback v. Niven*, L. R. 10 C. P. 645; 44 L. J. C. P. 396; and *Jenkinson v. Brandley Mining Co.*, 19 Q. B. D. 568.

At common law the sheriff can seize only those things which he can sell, and therefore a lien which is a mere personal right and cannot be made the subject-matter of a sale, cannot be taken in execution under a *fi. fa.* *Legg v. Evans*, 9 L. J. (N. S.) Ex. 102; 6 M. & W. 36; 8 Dowl. P. C. 177.

A ship and shares of a ship can be taken. The seizure of a ship is effected by putting a man on board with a warrant, which he must produce to the person in charge and affix to the mast as in the case of Admiralty proceedings. The sheriff's officer must, moreover, remain on board till payment. Prior to the seizure of a ship, care should be taken that the vessel is in the sheriff's bailiwick and that it entirely belongs to the execution debtor, for, except under special circumstances, the sheriff would not, it is conceived, be justified in seizing and detaining a ship in which the execution debtor was only partly interested.

If the mortgagee of a ship takes possession before execution executed, the vessel cannot be seized under the execution. *Ladbroke v. Crickett*, 2 T. R. 649; 1 R. R. 571.

The master of a ship may possibly attempt to sail despite the sheriff's officer being on board; to avert which, the sheriff should, if possible, secure the immediate assistance of the port authorities. The captain can, moreover, be proceeded against for contempt of Court for such an offence.

A sheriff may effectually seize, and sell by a bill of sale, shares of a ship without the necessity of going on board. *Harley v. Harley*, 11 Ir. Ch. 451. In that case, an execution debtor being the registered owner of shares in a ship, the sheriff obtained, and retained possession of the certificate of registry. The sheriff was thereupon registered at the Custom House under the Merchant Shipping Acts as owner of the shares, and afterwards sold and transferred the same to a purchaser by a registered bill of sale:—Held, that the seizure was effectual, although the sheriff did not go on board the ship, and that the property in the shares was regularly transferred by the bill of sale. In his judgment in *Harley v. Harley* the Master of the Rolls, after alluding to the usual way in which the sheriff executes the writ under a judgment against one partner, viz., by making a bill of sale of the actual interest, added, “That was done in this case.

(11) Lien,
non-seizable.

(12) Shipping
property,
seizable.

A part-owner of a ship is not necessarily a partner. He is a tenant in common with the other part-owners. I think that a bill of sale is the proper mode of executing the power vested in the sheriff."

On payment of the usual inspection fee at the local registry, the sheriff can obtain particulars of any existing mortgages of the ship or shares in question. A good local shipping register will, moreover, furnish him with all reliable information on this point, as also of what other shipping property may be owned by the execution debtor. And see under title "Bills of Sale," *post*, p. 305.

(13) Farming stock and growing crops, seizable subject to restrictions.

Farming stock and growing crops may be taken, subject to certain restrictions. See this subject discussed in detail, *post*, p. 244, under the title "Husbandry Provisions."

See the chapter on "Fixtures," *post*, p. 249.

(14) Fixtures.

(15) Goods sold by execution debtor prior to execution, or acquired by third parties for valuable consideration prior to seizure, non-seizable.

Under the old law, a debtor could not alienate his goods after a writ of execution was issued, but sect. 16 of the Statute of Frauds (29 Car. 2, c. 3) provides that "No writ of *fiери facias* or other writ of execution shall bind the property of the goods against which such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff or coroners to be executed." The effect of this provision was that the sheriff could not seize goods alienated by the debtor previous to the delivery of the writ, but that he could seize goods alienated after the delivery, since, except when sold in market overt, they were still subject to the rights of the judgment creditor. See *Samuel v. Duke*, 3 M. & W. 622; *Louthal v. Tonkins*, 2 Eq. Abr. 381; *Smallcomb v. Cross*, 1 Ld. Raym. 252; *Payne v. Drewe*, 4 East, 539. The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), has further modified the law. By sect. 1 of that statute it is enacted that "No writ of *fiери facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner."

The present law, therefore, is that the sheriff cannot seize goods alienated by the debtor prior to the delivery of the writ,

nor those goods alienated after delivery of the writ which have been sold in market overt, or which, though not sold in market overt, have been acquired by some person *bonâ fide*, for a valuable consideration and without notice of the delivery of any writ of execution before actual seizure.

Though the delivery of the writ to the sheriff binds the property from the date of delivery, it does not change the ownership; so a debtor's transfer is valid, but the purchaser takes the goods subject to the rights of the execution creditor.

Woodland v. Fuller, 11 Ad. & E. 859. For the purpose of ascertaining whether the writ was delivered to the sheriff before the completion of a purchase, the law regards fractions of a day. *Bowen v. Bramidge*, 6 C. & P. 140; *Godson v. Sanctuary*, 4 B. & Ad. 255. The provisions of the above-cited section of the Statute of Frauds as to indorsing the date of the receipt of a writ, and of the Sheriffs Act as to giving a written receipt for the writ, have been set out *ante*, p. 57. Delivery of a *fi. fa.* to the sheriff's deputy in London is equivalent to a delivery to the sheriff in the country. *Woodland v. Fuller, supra*.

Such a seizure by a sheriff of a debtor's goods under an execution as would have been good before the above Act is an "actual seizure" within the above section, and the expression "actual seizure" means no more than "seizure." Where premises consisting of a mansion house, offices, gardens, farm and farm-house, are in the same county and in one and the same occupation as an entirety, a seizure by a sheriff at the mansion house of part of the effects liable to the execution in the name of the whole is an "actual seizure," within the statute, of everything on the premises liable to the execution, whatever the extent of the premises and however dispersed the effects may be. *Seemle, per Bramwell, B.*: Knowledge that a writ of execution will probably at a certain time be delivered to the sheriff is not, when that time arrives, notice that it has been delivered within the statute. *Gladstone v. Padwick*, L. R. 6 Ex. 203; 40 L. J. Ex. 154.

See also under this head, *Union Bank of London v. Lenanton*, 3 C. P. D. 243; 47 L. J. Q. B. 409; *Hobson v. Thelluson*, 2 L. R. Q. B. 642; 36 L. J. Q. B. 302; *Bristol (Earl) v. Wilsmore*, 2 D. & R. 755; 1 B. & C. 514; *Willies v. Farley*, 3 C. & P. 395; *Scarfe v. Halifar*, 10 L. J. (N. S.) Ex. 332; 7 M. & W. 288; and *Lockley v. Pye*, 8 M. & W. 133; 9 D. P. C. 744.

(16) Lease-
hold interest,
seizable.

A leasehold interest may be taken, but not a mere equitable interest in a term of years. *Scott v. Scholey*, 8 East, 467; *S. P., Metcalf v. Scholey*, 2 N. R. 461; *Lyster v. Dollond*, 1 Ves. Jun. 431; 3 Bro. C. C. 478; and *In re The Duke of Newcastle, Ex parte Padwick*, L. R. 8 Eq. 700; 39 L. J. Ch. 68. And in the case of an outgoing tenant having agreed to assign the remainder of his term to the incoming tenant, the sheriff before an actual assignment made, may, under an execution against the outgoing tenant, sell his interest in such remaining term and set upon it the same value that the incoming tenant has agreed to give for it. *Sparrow v. Bristol (Earl)*, 1 Marsh. 10. Moreover, where a tenant has entered under an agreement for a lease and paid the stipulated rent, a tenancy from year to year is created, which the sheriff may sell under a *fi. fa.* *Doe d. Westmoreland v. Smith*, 1 M. & R. 137.

The sheriff can also sell fixtures apart from a lease, if he cannot find a purchaser for the whole. *Barnard v. Leigh*, 1 Stark. 43.

The sheriff's seizure of a lease does not, however, vest the term in the sheriff until he has executed an assignment to a purchaser. Therefore, where a lease is taken in execution by the sheriff, the interest in it remains in the execution debtor until actual assignment to the purchaser; and a sheriff, who under a *fi. fa.* takes in execution a lease for years, has no right to remain on the premises for the purpose of executing an assignment and putting the purchaser in possession. If he should do so, he is liable in trespass at the suit of the execution debtor, if in possession, although the premises have been sold and transferred. *Playfair v. Musgrove*, 14 M. & W. 239; 15 L. J. Ex. 26; and see *Doe d. Hughes v. Jones*, 1 Dowl. N. S. 352; 12 L. J. Ex. 265.

The sheriff's assignment of a term is sufficient without an actual seizure of the lease. *Coleman v. Rawlinson*, 1 F. & F. 330. Nor where the sheriff has seized the lease, and sold the term before the writ is returnable, does his non-execution of an assignment to the purchaser till a subsequent period affect the validity of the sale. *Doe d. Stevens v. Donston*, 1 B. & A. 230; and see under this head *Rumball v. Murray*, and *Miller v. Parnell*, *ante*, p. 70, as also *Griffen v. Caddell*, 9 Ir. C. L. 488, Q. B.

(17) Equity
of redemp-
tion, non-
seizable.

The sheriff cannot seize an equity of redemption under this writ. *Lyster v. Dollond*, 1 Ves. Jun. 431; *Burdon v. Kennedy*, 3 Atk. 739.

Execution against partnership property on a judgment against the firm is similar to execution against an individual; but the execution creditor is not limited to this execution against the firm's property. He may also, subject to the provisions of Order XLVIII^a. of the Rules of Supreme Court, issue execution against the individual partners, and such writs are executed in the same way as other writs against individuals.

As to procedure against the partnership property for a partner's separate judgment debt, formerly a creditor of one partner could take out execution against the partnership effects subject to his only having the undivided share of his debtor and taking it in the same manner the debtor himself had it, and subject to the rights of the other partners. But by the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23, "(1) After the commencement of this Act [1st January, 1891], a writ of execution shall not issue against any partnership property, except on a judgment against the firm. (2) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a County Court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require. (3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same. (4) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act." And by sect. 33, sub-s. 2, "a partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt." For definitions of "partnership," "firm," and "partnership property," see sects. 1, 4, and 20, and as to "property bought with partnership money," see sect. 21 of the Partnership Act, 1890.

(18) Partners and partnership property.

Procedure against partnership property for a partner's separate judgment debt.

In an execution under a judgment against a married woman, (19) Goods

of married
woman, how
far seizable.

the sheriff can only seize such separate property as she possesses free from any restriction against anticipation. *Scott v. Morley*, 20 Q. B. D. 120. See the form of the writ, *ante*, p. 57, and the chapter on "Execution in relation to Married Women," *post*, p. 270.

Stay of Execution.

Execution
stayed by
order of Court
in which ac-
tion is pend-
ing.

Execution is not now stayed by injunction from the Chancery Division, but by an order of the Court in which the cause or matter is pending. See the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 24, sub-sect. 5; *Wright v. Redgrove*, 11 Ch. D. 24; 40 L. T. 206; 27 W. R. 562; *Powell v. Jewsbury*, 9 Ch. D. 39; 39 L. T. 213; 27 W. R. 142; *Jersey (Earl) v. Uxbridge Rural Sanitary Authority*, [1891] 3 Ch. 183; 64 L. T. 858. The circumstances under which an order staying execution will be granted is a matter beyond the scope of this work, but the authorities on the subject are collected in the note to the above section in the Annual Practice; and see also Order LVIII., Rules 16 and 17, of the Rules of the Supreme Court. Execution is usually stayed on an application made at the trial, and in that case, since the parties, or their representatives, are present when the order is made, no service or notice of it is necessary, though preferable. *Osborne v. Tennant*, 14 V. 136; *United Telephone Co. v. Dale*, 25 Ch. D. 778; 53 L. J. Ch. 295; 50 L. T. 85; 32 W. R. 428. If the parties are not present when the order is made, notice of it should be served on the judgment creditor, and, also, if he is in possession, upon the sheriff. In cases of urgency, this notice may be by telegram to the creditor or the sheriff, or, as suggested by James, L. J., in *Ex parte Langley, In re Bishop*, 13 Ch. D. 110, at p. 122; 49 L. J. Bk. 1; 43 L. T. 181; 28 W. R. 174, by telegram to some local solicitor directing him to serve notice of the stay. This course obviates the difficulty, which arose in that case, of the sheriff disbelieving the telegram. If the sheriff knows that a stay has been granted, and proceeds with the sale, he will be liable even though notice of the order has not been served upon him. *United Telephone Co. v. Dale, ante*. In *Ex parte Langley, ante*, it was held that it was the duty of the sheriff's officer, who received notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted by the Court of Bankruptcy to restrain a sale in

the country under an execution, to telegraph to the Court of Bankruptcy, or to the London agents of the sheriff, to ascertain whether an injunction has really been granted. This, however, it was held, is not the duty of the auctioneer who is conducting the sale; he is only bound to communicate with the sheriff's officer who has instructed him to sell. A sheriff's officer, who was not himself present at the sale, and who had no actual notice of the injunction, was in the same case held not to be responsible for the act of his deputy who allowed the sale to be continued after receiving notice by telegram of the stay. See also under title "Bankruptcy, &c.," *post*, p. 359.

Death of Parties.

The sheriff may execute a writ of *fieri facias* and pay over the proceeds of the execution to the executor or administrator if, after the writ has been sued out, the plaintiff die (*Cleve v. Veer*, Cro. Car. 459), and if there is no executor or administrator, the money must be brought into Court and deposited there. *Thoroughgood's Case*, Noy, 73. So, also, it seems that if, before execution of a writ of *fieri facias*, the defendant die, the sheriff may execute the writ upon the goods of the defendant in the executor's hands.

How far death of parties affects execution.

Goods seized under a *fi. fa.* are bound from the date of the *teste* of the writ, except as against purchasers in market overt. Therefore, where the execution debtor died between the issuing and the execution of the writ, the execution creditor's title was held to be paramount to that of the executor. *Ranken v. Harwood*, 10 Jur. 794.

Where a defendant died between eleven and twelve o'clock in the morning and a *fi. fa.* was sued out against his goods between two and three in the afternoon of the same day, the Court set aside the execution as irregular. *Chick v. Smith*, 8 D. P. C. 337; 4 Jur. 86.

Withdrawal from Possession.

On the discharge of his claim by the execution debtor, the sheriff must, of course, withdraw immediately. As to the execution creditor's liability for failure to withdraw the sheriff from pos-

Withdrawal to take place immediately claim is discharged.

session after composition, see *Phillips v. General Omnibus Co.*, 50 L. J. Q. B. 112.

Where a sheriff has taken possession of effects under a *fi. fa.* his officer should continue in possession, or if he abandon it even necessarily for a time, he must clearly and satisfactorily account for so doing, in order to sustain his right against others afterwards claiming under legal authority to seize the same goods; and, in case of an abandonment on the return day of the writ, possession cannot afterwards be resumed. *Ackland v. Paynter*, 8 Price, 95.

Where a bailiff, under a sheriff's warrant addressed to him alone, and not to him and his assistants, seized goods in execution, left them in charge of keepers, and went away, and, during his absence, the goods were rescued from the keepers, it was held that the rescuer could not be convicted of having by threats and violence compelled the bailiff to abandon the seizure. *R. v. Noonan*, 10 Ir. R. C. L. 505, C. C. R.

Re-entry.

Where the sheriff has entered and then withdrawn his writ in consequence of an arrangement having been come to between the execution creditor and the execution debtor, the sheriff cannot re-enter without fresh instructions from the execution creditor, and he is justified in executing a subsequent writ without notice to the former execution creditor. *Shaw v. Kirby*, 52 J. P. 182. It is, moreover, submitted that the sheriff cannot re-enter after withdrawing from possession without written authority from the execution debtor, and which authority it is certainly always desirable to obtain before any temporary withdrawal. And see as to temporary withdrawal from possession, *Crowder v. Long*, 8 B. & C. 598; 3 M. & R. 17; and as to execution creditor's notice to withdraw, *Walker v. Hunter*, 2 C. B. 324; 15 L. J. C. P. 12.

If an execution creditor abandons his process against certain goods seized under a *fi. fa.* in favour of a claimant, the sheriff has still a right to show in an action against him that the goods were the defendant's property. *Baynton v. Harvey*, 3 D. P. C. 344.

Incidental to Seizure.

If a sheriff wrongfully seizes goods which are afterwards taken from him by another wrong-doer, the owner of the goods

may in an action against the sheriff recover, as special damages, the amount necessarily paid to the other wrong-doer in order to get back the goods. *Keene v. Dilke*, 4 Exch. 388; 18 L. J. Exch. 440.

The allowance of a writ of error is sufficient to render a sheriff executing a *fi. fa.*, after notice of such allowance, liable in an action of trespass, without any writ of *supersedeas* being issued, and notice to the sheriff is notice to the officers executing the process. *Belshaw v. Marshall*, 1 N. & M. 689; 4 B. & Ad. 336.

A sheriff who seizes the goods of a debtor under a *fi. fa.* is not, however, bound by an estoppel, which might have prevented the debtor himself from claiming the goods. *Richards v. Johnston*, 4 H. & N. 660; 5 Jur. N. S. 520; 28 L. J. Exch. 322.

The execution of a *fi. fa.* is good though the sheriff be a trespasser, although in such a case the Court may, possibly, exercise its summary jurisdiction to avoid the execution. *Smith's Leading Cases*, 9th ed., Vol. I., p. 128.

Duties of Sheriff on Service of Notice of Receiving Order.

The Bankruptcy Act, 1890, provides by sect. 11, sub-sect. 1, that "Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge;" and by sub-sect. 2 of the same section that, "Where under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff

Duties of sheriff as to goods taken in execution on service of notice of receiving order.

has notice, the sheriff shall pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

For notes and cases on this section, see under title "Bankruptcy, &c.," *post*, p. 359.

Sale.

Sale must follow seizure within reasonable time.

Failing discharge of the claim by the execution debtor, and subject to supervening claims, a sale by the sheriff must follow seizure, and he must sell within a reasonable time and before the return of the *venditioni exponas* or he will be liable to an action (*Jacobs v. Humphrey*, 4 Tyr. 272; 2 C. & M. 413); and see as to consequent damages, *Bales v. Wingfield*, 2 N. & M. 831; *S. P.*, *Aireton v. Davis*, 3 M. & Scott, 138; 9 Bing. 740. As to delay in selling at the debtor's request, see *Wright v. Child*, 1 L. R. Ex. 358; 35 L. J. Ex. 209; and as to postponed sale, see *Botten v. Tomlinson*, 16 L. J. C. P. 138.

If execution for more than 20*l.*, sale to be by auction.

When the sheriff sells the goods of a debtor under an execution for a sum exceeding 20*l.* (including legal incidental expenses), the sale shall, unless the Court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale. Bankruptcy Act, 1883, s. 145; and see *Ex parte Berthier*, 7 Ch. D. 882; *Turner v. Bridgett*, 8 Q. B. D. 392; *Mostyn v. Stock*, 9 Q. B. D. 432; *Ex parte Villars*, L. R. 9 Ch. 432; 43 L. J. Bank. 76; *Jones v. Parcell*, 11 Q. B. D. 430; and *Ex parte Hall*, 14 Ch. D. 132.

And see as to application under this section to sell goods by private contract, *Hunt v. Clifford*, W. N. (1884) 86; the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 12; and Ord. XLIII. rr. 8—15 of R. S. C., 1883.

Rule 8 of these rules directs the application to be by summons, a copy of which must be served on the sheriff, who must then send to the applicant a list of the names and addresses of all persons who have lodged writs of execution against the debtor with him. Rule 12 enables the sheriff to be heard on the hearing of the summons.

Moreover, in *Edge v. Kavanagh*, 24 L. R. Ir. 1, the Court set aside the sheriff's public sale under a *fi. fa.* of the execution debtor's chattel interest in a farm of land on the ground that

the sheriff did not take reasonable and proper care to advertise the sale and that the farm was sold at an undervalue. But in *Cramer v. Murphy*, 20 L. R. Ir. 572, where, after two adjournments for want of bidders, the sheriff sold debtor's chattel interest in a farm, admittedly of value, for a sovereign, the Court, in the absence of evidence of collusion, refused to set aside the sale. If the sheriff sells goods seized under the same writ on different days, all the sales will be considered as one transaction. *In re Villars, Ex parte Rogers*, L. R. 9 Ch. 432; 43 L. J. Bk. 76; 30 L. T. 348; 22 W. R. 603.

In an Irish case it has been held that a sale should, as a rule, take place on the execution debtor's premises; but where there is good and sufficient reason for so doing, or the execution creditor assents, the effects may be removed to a more suitable place for sale. See *Re Purcell*, 13 L. R. Ir. 489.

It would certainly be better that the sheriff should obtain the debtor's licence to hold the sale upon his premises, as there appears to be some doubt as to his authority to use the premises for the purpose of a sale.

The Court will not interfere to restrain a sheriff from selling goods, under a *fi. fa.*, on an offer of indemnity by a third person claiming the goods. *Harrison v. Forster*, 4 D. P. C. 558; 1 H. & W. 650.

The sheriff must not sell goods greatly under their value, and if he cannot obtain a reasonable price he should return that he has taken goods which "remain in his hands for want of buyers and wait until he has been served with a writ of *renditioni exponas*, under which he will be obliged to sell them for whatever price may be offered." 14th ed. Chit. Archb. p. 840. But where a sheriff retained seized effects because of his considering a sale effected by his broker fraudulent, it was held that he was not justified in returning that the seized effects remained in his hands for want of buyers, but that he should have applied to the Court for further time on account of the special and unforeseen circumstances of the case; whilst the inadequate price offered is in such a case the proper measure of damages in an action for false return. *Barnard v. Leigh*, ante, p. 78.

Sheriff must not sell goods greatly under value.

Prima facie, a sheriff's sale is to be considered to be for ready money and immediate delivery, and he is not justified after he has sold as much as apparently satisfies the writ in going on to sell more upon a speculation that it is possible that actual

delivery of such goods, as he has already sold, may be prevented by loss or accident. *Aldred v. Constable*, 6 Q. B. 370; 8 Jur. 956.

Sheriff not to
sell more than
necessary.

It is the duty of the sheriff's officer to stop the sale as soon as sufficient money is raised. *Cook v. Palmer*, 6 B. & C. 739; 9 D. & R. 723; *per* Dallas, C. J., in *Stead v. Gascoigne*, 8 Taunt. 527, "A sheriff has no right to sell more than necessary;" and see on this point *Gawler v. Chaplin*, *ante*, p. 66. And if a sheriff sells more goods than are sufficient to satisfy an execution, he is liable in trover in respect of the excess. *Batchelor v. Vyse*, 4 M. & Scott, 552.

The execution creditor is not precluded from becoming the purchaser of the seized property. *Stratford v. Twynam*, Jac. 418; and see *In re Villars, Ex parte Rogers*, *ante*, p. 85.

Bills of sale by the sheriff are not, it seems, necessary, except in the case of ships and shares of ships, and where the sold property is a term of years or any other kind of chattel real; and, where necessary, such bills of sale should apparently be attested in manner provided for by the Bills of Sale Act, 1878.

In the case of a bill of sale of chattels executed by an under-sheriff in the name of the sheriff, it is unnecessary to prove the latter's authority. *Wood v. Rowcliffe*, 11 Jur. 707. And when a bill of sale is made by a sheriff's officer, the Court will presume that he was duly authorized to make it. *Robinson v. Collingwood*, 17 C. B. (N. S.) 777. Moreover, a bill of sale signed by the deputy of the under-sheriff is valid. *Cookson v. Fryer*, 1 F. & F. 328.

An action does not lie against the sheriff upon a promise to execute a bill of sale to the plaintiff's nominee. *Cameron v. Reynolds*, Cowp. 406.

"In the case of sales by sheriffs of goods and chattels taken in execution, the sheriff does not impliedly warrant his title to sell, or warrant the purchaser against eviction; he merely promises that he does not, at the time he sells, know of any defect in his authority, or that he has no right or title to sell." Addison on Contracts, 9th ed. p. 545.

"An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy." Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 46, sub-s. 3.

The sheriff must not stay an unreasonable time on the premises after seizure and sale. *Playfair v. Musgrove*, *ante*, p. 78; and see judgment of Pollock, C. B., in that case. And see under this head, *Duncan v. Garratt*, 1 C. & P. 169, and *Farebrother v. Ansley*, 1 Camp. 343. And a sheriff who has remained in possession for an unreasonable period at the instance of the execution creditor, and without the debtor's consent, is not entitled under sect. 46 of the Bankruptcy Act, 1883 (see now sect. 11 of the Bankruptcy Act, 1890), to charge against the debtor the costs of retaining such possession beyond what is a reasonable time. *In re Finch*, *Ex parte The Sheriff of Essex*, 65 L. T. 466; 40 W. R. 175; 8 M. B. R. 284.

Sheriff not to stay unreasonable time after seizure and sale.

A writ of *fiery facias*, returnable "immediately after the execution thereof," is not, however, executed until the whole amount indorsed is levied under it, and may, if in the hands of the sheriff, be put in force after the levy of a part. *Jordan v. Binckes*, 18 L. J. (N. S.) Q. B. 277; 7 Dowl. & L. P. C. 30.

The purchaser from the sheriff is bound to remove the goods within a reasonable time; and if he leaves goods on demised premises for his own convenience, the landlord can distrain on them. *Ex parte The Pollen Trustees, Re Davis*, 55 L. J. Q. B. 217; 54 L. T. 304.

Purchaser must remove goods within reasonable time.

Reporting result of Execution, &c., Return, and accounting for Proceeds.

The sheriff must, as early as practicable, report to the execution creditor, or his solicitor, the actual result of the execution, and, subject to the provisions of sect. 11 of the Bankruptcy Act, 1890 (*a*), also promptly transmit the amount obtained, less his fees and expenses (*b*). And in *Stockdale v. Hansard*, 3 P. & D. 330; 8 D. P. C. 522; 11 A. & E. 253, it was held that a resolution of the House of Commons ordering the sheriff to refund to the defendants, who were printers to the House of Commons, the amount levied upon their goods, did not authorize the sheriff to withhold the payment of the proceeds of the levy to the execution creditor.

When result of execution to be reported,

and amount obtained transmitted.

After a return to a *fi. fa.* that the money is levied, the sheriff

(*a*) See under title "Bankruptcy," *post*, pp. 359 *et seq.*

(*b*) As to sheriffs' fees, see under title "Sheriffs' Fees, &c.," *post*, p. 506.

is liable to an action for it, without any demand of payment. *Dale v. Birch*, 3 Camp. 347. But in an action brought against the sheriff for money levied under a *fi. fa.* without any previous demand, the Court will stay the proceeding upon payment of the sum levied without costs. *Jefferies v. Sheppard*, 3 B. & A. 696.

Although there may be strong reason to believe that a *fi. fa.* had been issued in order to defraud the execution of a *bonâ fide* creditor, and that the sheriff is a party to the fraud, the Court will not interfere summarily to compel the sheriff to pay over the proceeds of the levy to the *bonâ fide* creditor; but the question of fraud must be tried by a jury. *Barber v. Mitchell*, 2 D. P. C. 574.

Action for money levied to be commenced within six years.

By 3 & 4 Will. 4, c. 42, s. 3, an action for money levied on any *fi. fa.* shall be commenced and sued out within six years after the cause of such action. And see Rules of Supreme Court, 1883, Ord. LII. r. 2, and in connection therewith *Delmar v. Freemantle*, 3 Ex. D. 237; 47 L. J. Ex. 767; 26 W. R. 683.

Return of writ.

A sheriff cannot be held liable for the non-return of a writ of *fi. fa.* until he has been called upon, and has neglected to make a return, and such neglect as will give a cause of action must be specifically alleged in the statement of claim. *Shaw v. Kirby*, ante, p. 82. The defendant as well as the plaintiff may rule the sheriff to return the writ. *France v. Clarkson*, 2 D. P. C. 532; and see *Edmunds v. Watson*, 2 Marsh. 330; 7 Taunt. 5; and *Richardson v. Trundle*, 8 C. B. N. S. 474; 29 L. J. C. P. 310.

Where, however, a sheriff has applied to the Court under the Interpleader Act, and his rule is discharged, he is entitled to a reasonable time for the return of the writ after the disposal of the rule, before an attachment can issue against him. *Rex v. Hertfordshire (Sheriff)*, 5 Dowl. P. C. 144. And see as to return in the case of interpleader proceedings, *Clearer v. Fisher*, 2 Dowl. N. S. 292; and *Angell v. Baddeley*, 3 Ex. D. 49; 47 L. J. Ex. 86.

And no sheriff shall be liable to be called upon to make a return of any writ of process, after the expiration of six months from the date at which he ceases to hold office. Sheriffs Act, 1887, s. 28 (3). *Rex v. Jones*, 2 T. R. 1; 1 R. R. 411. It was held under the earlier Act (20 Geo. 2, c. 37) that these months are lunar months: *Rex v. Alderley*, 2 Doug. 463; but see also *Webb v. Fairmaner*, 3 M. & W. 473.

The fact of a compromise between the parties, or of a claim for rent by the landlord, does not relieve the sheriff from the necessity of making a return. *Balson v. Meggat*, 3 D. P. C. 557.

When a sheriff has appointed a special bailiff to execute a writ of *fi. fa.* at the request and peril of the plaintiff, he should move to set aside any rule subsequently obtained by the plaintiff upon him to return the writ. If, instead of doing so, he returns that he appointed a special bailiff, to whom he refers as to the execution of the writ, the return may be set aside, even on motion by the plaintiff. *Tait & Co. v. Mitchell*, 22 L. R. Ir. 327.

"A sheriff shall not return to a writ that he has delivered it to a bailiff of some liberty not heretofore recorded, in the Exchequer." Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 10, sub-s. 2. In making a return, a reasonable degree of certainty is sufficient. *Reynolds v. Barford*, 8 Scott, N. R. 233; 7 M. & G. 449; 13 L. J. C. P. 177. It is no part of a sheriff's duty to annex the officer's name to the return. *Hill v. Middlesex (Sheriff)*, Holt, 217; 7 Taunt. 8. If the sheriff returns that the premises of the defendant are so barricaded that he is unable to ascertain whether the defendant has goods within the bailiwick on which a levy may be made, it is a bad return, as he should state either that the defendant has goods or that he has none. *Munk v. Cass*, 9 D. P. C. 332.

The sheriff's return of *nulla bona* is *prima facie* evidence that the party had no goods at that time. *Arril v. Mordant*, 3 L. J. (N. S.) K. B. 148; S. C., 3 N. & M. 871. In other words, the meaning of a return of *nulla bona* is that there are no goods applicable to the plaintiff's writ. *Shattock v. Carden*, 6 Ex. 725; 2 L. M. & P. 466; 21 L. J. Ex. 200.

Nulla bona is a proper return where the sheriff has paid the proceeds of an execution either in discharge of rent or of a prior writ. *Wintle v. Freeman*, 1 G. & D. 93; 11 A. & E. 539; *Heenan v. Evans*, 4 Scott, N. R. 2; 1 Dowl. N. S. 204; 11 L. J. (N. S.) C. P. 1; and *per Cave, J., In re Pearce, Ex parte Cross-thwaite*, 14 Q. B. D. 969.

Where, however, a sheriff, after being ruled to make a return to a *fi. fa.*, made a return that he had sold the goods seized, and had received for them sufficient to satisfy the moneys directed to be levied, but that he afterwards had notice from the landlord that two quarters' rent was due, that he had applied to the landlord, but had not been permitted by him to have evidence of his claim, and that though he, the sheriff, had used due

Return of
nulla bona.

diligence, he was unable to ascertain whether the landlord had any claim in respect of the rent, the Court quashed the return for insufficiency, and allowed an attachment to issue. *Hall v. Crawley*, 11 W. R. 344; and see *Hall v. Badden*, 7 L. T. N. S. 721. And the return of *nulla bona* was upheld where, the sheriff having entered under a *fi. fa.*, the officers of the Customs, before sale by him, seized the goods in his possession under a warrant to levy a penalty incurred by the defendant for an offence against the revenue laws. *Grove v. Aldridge*, 2 L. J. (N. S.) C. P. 44; *S. C.*, 9 Bing. 428; 2 M. & Scott, 568.

Where a sheriff returns *nulla bona* it is sufficient *prima facie* evidence for the plaintiff to prove that the sheriff seized the goods. *Stubbs v. Lainson*, 2 Gale, 122; 1 M. & W. 728. If a sheriff returns a seizure under that and another writ, it is bad. *Wintle v. Chetwynd (Lord)*, 7 Dowl. P. C. 554; 1 Will. Woll. & H. 581. But it is a sufficient return that he has seized goods of the defendant by virtue of several previous writs of *fi. facias* according to their priority (*Chambers v. Coleman*, 9 D. P. C. 588; and *In re Pearce, Ex parte Crossthwaite*, 14 Q. B. D. 966); and see, as to return in case of sheriff's concurrent receipt of several writs, *Ashworth v. Urbridge*, *ante*, p. 64. The sheriff ought in all cases to return some value to the goods seized, but the omission to do so is an irregularity only, and not a nullity. *Chambers v. Coleman*, *ante*; and see *Barton v. Gill*, 1 D. & L. 593; 12 M. & W. 315; 13 L. J. Ex. 83.

Moreover, where there are two writs, and the goods remain in the sheriff's hands for want of buyers, he must make some return as to the value of the goods, although he will not be bound by the amount stated. *Wintle v. Chetwynd*, *ante*. See also *Barnard v. Leigh*, *ante*, pp. 78, 85.

A return of withdrawal from possession in pursuance of an order from the execution creditor's solicitor is good. *Levy v. Abbott*, 7 D. & L. 185; 4 Ex. 588; 19 L. J. Ex. 62.

The Court will not compel the sheriff to give a specific return of the particulars and proceeds of goods sold under a *fi. fa.* on the ground that his officer has wasted the goods. *Willett v. Sparrow*, 2 Marsh. 293; 6 Taunt. 576.

Where a sheriff returns that he has retained a sum for possession money, it is no ground for quashing the return that the plaintiff is charged with more possession money than the amount payable by him for keeping possession. *Ib.*

Where a sheriff had failed to make any return to a writ of

Return of
withdrawal
from posses-
sion.

fi. fa., notwithstanding an order of course directing him to make his return forthwith, he was, upon an application *ex parte* against him for an order *nisi*, directed, upon the authority of *Erans v. Davies* (7 Beav. 81), to pay both the costs of the order *nisi* and of the previous order. *In re Heiron's Estate, Hall v. Ley*, 12 Ch. D. 795; 48 L. J. Ch. 688.

It is a sufficient answer to an attachment for not returning a writ that it was never turned over to the sheriff by his predecessor. *Thomas v. Newman*, 2 Dowl. N. S. 33.

An attachment against a late sheriff for disobedience to a judge's order calling on the "sheriff" to return a writ instead of "the late" sheriff is irregular, and may be set aside, though the sheriff has not applied to set aside the order. *Reg. v. Cornwall (Sheriff)*, 7 D. P. C. 600; and see *Yaroth v. Hopkins*, 2 C. M. & R. 250; 3 D. P. C. 711.

The act of ruling the sheriff to return a *fi. fa.* does not estop the plaintiff from showing that the writ was not a good writ, neither does the filing it of record affirm the existence of a void writ. *Jones v. Williams*, 8 M. & W. 349; 9 D. P. C. 702.

And a plaintiff who has ruled a sheriff to return a writ of *fi. fa.*, which the latter has omitted to do at the time specified, does not waive his right of attachment by afterwards directing the sheriff to proceed with the execution. *Howitt v. Rickaby*, 11 L. J. (N. S.) Ex. 73; 9 M. & W. 52.

And see as to liability for not returning a *fi. fa.*, *R. v. Sheriff of Devon, Nathan v. Elworthy*, 17 L. J. (N. S.) C. P. 116; and *Reg. v. Essex (Sheriff)*, 8 Scott, 363; 6 Bing. N. C. 150; 8 D. P. C. 5.

No action is maintainable, without an averment of special damage, against a sheriff for a false return to a *fi. fa.*, where no damage could necessarily result to the creditor. *Wylie v. Birch*, 3 G. & D. 629; 4 Q. B. 566; 12 L. J. Q. B. 260; and see *Stimson v. Farnham*, L. R. 7 Q. B. 175; 41 L. J. Q. B. 52.

If after a return to a *fi. fa.* that part only of a debt has been levied, and that the debtor has not goods whereon the whole can be levied, the creditor accepts that part on account, he does not thereby waive his right of action for a false return. *Holmes v. Clifton*, 4 P. & D. 112; 10 A. & E. 673; 2 P. & D. 556; and see as to levying part only of the debt and false return, *Shule v. Hawley*, 14 L. J. (N. S.) Ex. 217; 13 M. & W. 757. And an action lies against the sheriff for a false return to a *fi. fa.* notwithstanding the plaintiff, before commencing the suit,

Liability for not returning.

Action against sheriff for false return.

has charged the original defendant in execution. *Wordall v. Smith*, 1 Camp. 332.

Under the plea of "not guilty" in an action against the sheriff for a false return to a writ of *fi. fa.*, the only matter in issue is the fact of the sheriff having made a false return. *Wright v. Lainson*, 6 L. J. (N. S.) Ex. 197; 2 M. & W. 739; and see *Lewis v. Alcock*, 7 L. J. (N. S.) Ex. 55; 3 M. & W. 188.

In an action against the sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, the allegation in the declaration that the defendant took goods and chattels, in execution, of the value of the moneys indorsed on the writ, "and then levied the same thereout," imports not only a seizure and a sale under the plaintiff's writ, but also that the sheriff had in his hands the proceeds of the sale, for the purpose of handing them over to the plaintiff. *Drewe v. Lainson*, 9 L. J. (N. S.) Q. B. 69; 11 Ad. & E. 529; 3 P. & D. 245.

The Court will not try on affidavit whether the return made by a sheriff to a writ is false, even though a strong case is made out showing fraud and collusion; but the party must resort to his remedy by action, and if the sheriff takes on himself to state facts which constitute a good return in point of law, the only remedy is by an action for a false return. *Goubot v. De Crouy*, 2 D. P. C. 86; 1 C. & M. 772; 3 Tyr. 906.

When the solicitor of a judgment creditor delivered to the sheriff a *fi. fa.* returnable on a day certain, with directions by letter not to execute it till the return, unless another execution should come in the meantime, and afterwards sent in an *alias* accompanied with the same directions, and the sheriff upon another execution coming in issued warrants on and executed both writs on the same day, giving precedence to the last execution, and satisfying that wholly first out of the money levied, and then paid over the remainder in part satisfaction of the execution first delivered, and returned that payment and *nulla bona* as to the residue:—Held, that the plaintiff could not maintain an action against the sheriff for a false return, and that a nonsuit on that ground had been properly directed. *Pringle v. Isaac*, 11 Price, 445.

In *Remmett v. Lawrence*, 15 Q. B. 1004; 20 L. J. Q. B. 25; 14 Jur. 1067, a sheriff returned to a *fi. fa.* against W., that before the delivery thereof to him another *fi. fa.* against W.

was delivered to him, and that by virtue thereof he seized the goods of W. In an action against the sheriff for a false return:—held, that the sheriff was not estopped by his return from showing that the goods seized under the first writ were not the goods of W.

If in an action for a false return of *nulla bona* to a *fi. fa.* the plaintiff shows the debtor to be possessed of certain goods, it is no defence for the sheriff to show a prior execution to an amount of greater value, if to that execution the sheriff also returned *nulla bona*, nor if the sheriff has the proceeds of the goods in his hands. Nor is it any defence to an action for a false return of *nulla bona* to a *fi. fa.* to show that it was delivered at the sheriff's office at a quarter past five o'clock on the day on which it was returnable. *Towne v. Crowder*, 2 C. & P. 355. And where in an action against a sheriff for a false return of *nulla bona*, the defence is that at the time of receiving the plaintiff's writ the sheriff had in his hands other writs of execution, to an amount sufficient to cover the whole of the defendant's property, the plaintiff may give evidence to show that those other judgments and executions were fraudulent and void against creditors, without proving that the sheriff was party to the fraud. *Imray v. Magnay*, 2 Dowl. N. S. 531; 11 M. & W. 267; 12 L. J. Exch. 188.

It, moreover, appearing in the latter case (*Imray v. Magnay*) that the sheriff handed over the money in defiance of notice to retain the proceeds in his hands until the first execution was set aside, he was held liable for misconduct in lending himself to the other party. And see *Warmoll v. Young*, 8 D. & R. 442; 5 B. & C. 660; see also *Shattock v. Carden*, 21 L. J. (N. S.) Ex. 200; 6 Ex. 725; and *Christopherson v. Burton*, *ante*, p. 64.

And see as to actions for false return of *nulla bona* in connection with priority of executions, *Saunders v. Middlesex (Sheriff)*, 3 B. & A. 95; and *Dennis v. Whetham*, L. R. 9 Q. B. 345; 43 L. J. Q. B. 129. See also as to false return, *Kelly v. Browne*, 12 L. R. Ir. 348, 354; *Harrison v. Paynter*, *ante*, pp. 64, 72; *Levy v. Hale*, 29 L. J. (N. S.) C. P. 127; 1 L. T. N. S. 132; *Barnard v. Leigh*, *ante*, pp. 78, 85; *Wylie v. Pearson*, Dowl. N. S. 807; 6 Jur. 806; and *Jones v. Clayton*, 4 M. & S. 349.

In discussing a rule *nisi* for an attachment against a sheriff for an insufficient return to a writ, the Court will not take cognizance of the return unless an office copy is produced,

verified by affidavit by a party as to his belief that no sufficient return has been made. *Wilton v. Chambers*, 5 N. & M. 431; 1 H. & W. 582.

If a sheriff continues in possession after the return day of the writ, that irregularity makes him a trespasser *ab initio*, but will not support the allegation of a new trespass committed by him after the acts which he justifies under the execution. *Aitkenhead v. Blades*, 5 Taunt. 198; 1 Marsh. 17.

As to sheriff's liability to pay over amount levied, see *ante*, pp. 87 *et seq.*

As to "Rules to Return" and "Attachment of Sheriff," see under "Liability and Rights of Sheriff and Remedies against Sheriff," *post*, p. 494.

Forms of Return.

1. *Return of Fieri Feci.*

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-named C. D. the moneys [*or* "£ "] and interest within mentioned, which I have ready at the day and place within mentioned, to be rendered to the within-named A. B., as I am within commanded.

The answer of S. S., Esq., Sheriff.

2. *Return of Nulla Bona.*

The within-named C. D. has no goods or chattels in my bailiwick whereof I can cause to be made the moneys [*or* "£ "] and interest within mentioned, or any part thereof, as I am within commanded.

The answer of S. S., Esq., Sheriff.

3. *Return of Fieri Feci for Part and Nulla Bona as to Residue.*

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-named C. D. to the value of £ which said money I have ready at the day and place within mentioned, to be rendered to the within-named A. B. and I further certify and return that the said C. D. hath no more goods or chattels in my bailiwick, whereof I can cause to be made the residue of the within-mentioned moneys [*or* "£ "] and interest or any part thereof, as I am within commanded.

The answer of S. S., Esq., Sheriff.

4. *Return of Fieri Feci for Part and that Sheriff has paid Part of Sum levied to the Landlord for Rent, and a Retainer for Poundage, &c.*

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-named C. D. to the value

of £ ; £ , part whereof, I have paid to L. L. the landlord of the premises on which the said goods and chattels were seized under the said writ, for rent (not exceeding for one year) due to him for the said premises on last, and £ further part whereof, I have retained in my hands for poundage, officer's fees, costs of levying, and other my expenses of the execution; and £ , the residue whereof, I have ready at the time and place within mentioned to be rendered to the within-named A. B. as within commanded. And the said C. D. hath not any more goods or chattels in my bailiwick, whereof I can cause to be made the residue of the within moneys [*or* "£ "] and interest, or any part thereof, as I am within commanded.

The answer of S. S., Esq., Sheriff.

5. *The Like, for Rent and Taxes; to be annexed to the Writ.*

I certify and return, that, by virtue of the writ hereto annexed, I have caused to be made of the goods and chattels of C. D. in the said writ named in my bailiwick, to the value of £ ; £ part whereof, at the request of the said within-named A. B. I have paid to L. L. of the landlord of the premises whereon the goods and chattels were seized for rent (not exceeding for one year) due to the said landlord for and in respect of the said premises on last, and which said premises at the time of the seizure by me of the said goods and chattels, under and by virtue of the said writ, were in the tenure and occupation of the said C. D. as tenant thereof to the said L. L.; £ further part whereof, I have paid for taxes (not exceeding one year) due from the said C. D. to her Majesty; £ further part whereof I have retained for poundage, officer's fees, costs of levying, and other my expenses of the execution; and £ , residue thereof, I have paid to the said A. B. [*or, if not already paid, see the next form*]. And I further certify that the said C. D. hath no more goods or chattels in my bailiwick whereof I can cause to be made the residue of the said moneys [*or* "£ "] and interest, or any part thereof.

By the same sheriff.

[*Make the following indorsement on the writ*]:—The execution of this writ appears in the schedule hereunto annexed.

The answer of S. S., Esq., Sheriff.

6. *The Like, for Taxes only.*

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-named C. D. to the value of £ ; £ part whereof, I have paid to L. L. for Queen's taxes (not exceeding for one year) due for and in respect of the premises whereon the goods and chattels were seized by me at the time of seizing the said goods and chattels and £ further part whereof I have retained in my hands for poundage, officer's fees, costs of levying, and other my expenses of the execution, and £ , the residue of the said £ , I have ready at the time and place within mentioned, to be rendered to the said A. B. as I am within commanded: And the said C. D. hath not any more goods or chattels in my bailiwick whereof I can cause to be made

the residue of the within-mentioned moneys [*or “£ ”*] and interest, or any part thereof, as I am within commanded.

The answer of S. S. Esq., Sheriff.

7. Return of Fieri Feci as to Part, and an Interpleader Order as to Residue.

I certify and return that by virtue of the writ hereunto annexed I have caused to be made of the goods and chattels of C. D. in the said writ named, to the value of £ ; £ , part whereof I have retained in my hands for poundage, officer's fees, costs of levying and other my expenses of the execution; and £ residue whereof, I have ready at the time and place within mentioned to render to A. B. in the said writ named for part of the moneys [*or “£ ”*] and interest in the said writ named. And I further certify, that I caused to be seized divers other goods and chattels as and for the goods and chattels of the said C. D. in my bailiwick, which were afterwards claimed by E. F. as his goods and chattels. And I further certify and return that in obedience to an interpleader order made in respect of that claim by the Honourable Mr. Justice , a copy whereof is hereto annexed, marked “B,” I sold the same for the sum of £ , being the best price I could obtain for the same, £ , part whereof, I have paid and retained for fees and expenses for and on account of the seizing and keeping possession and sale by auction of the said goods and chattels; and £ residue whereof, I have paid into Court as the proceeds of the said goods and chattels [*all this must agree with the interpleader order*]. And I further certify and return, that the said C. D. hath not any more goods or chattels in my bailiwick, whereof I can cause to be made the residue of the moneys [*or “£ ”*] and interest in the said writ mentioned or any part thereof.

The answer of S. S., Esq., Sheriff.

8. Return that the Goods taken were Let to Defendant, and remain in Sheriff's hands for want of Buyers.

By virtue of this writ to me directed, I have taken in execution the interest and property of the within-named C. D. of and in certain goods and chattels of E. F. now in a certain messuage and premises situate at , in my bailiwick, subject to the right of C. D. to use and enjoy the same during a certain term the said goods and chattels having, before the said writ was delivered to me, been demised and let by the said E. F. to the said C. D. for such term, which is still unexpired, and which said interest and property of the said C. D. of and in the said goods and chattels being of the value of the moneys [*or “£ ”*] and interest within mentioned [*or “of the value of £ ”*], remains in my hands unsold for want of buyers. (*If the value returned be less than the amount of moneys and interest ordered to be levied by the writ, proceed to return nulla bona for the residue as in No. 3, supra.*) Therefore I cannot have the money within mentioned before Our Lady the Queen at the day and place within mentioned, as I am within commanded.

The answer of S. S., Esq., Sheriff.

9. *Return that the Sheriff has taken Goods, which remain in his hands for want of Buyers.*

By virtue of this writ to me directed, I have taken goods and chattels of the within-named C. D. in my bailiwick to the value of £ [or "of the moneys"] and interest within mentioned, which goods and chattels remain in my hands unsold for want of buyers. Therefore I cannot have that money [or "those moneys and interests"] before Our Lady the Queen at the day and place within mentioned, as I am within commanded. (*If the value returned be less than the amount of moneys and interests ordered to be levied by the writ, proceed to return nulla bona for the residue, as in Form No. 3, supra.*)

The answer of S. S., Esq., Sheriff.

10. *The Like, where part of the Goods have been Sold and the rest remain in hand, &c.*

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-named C. D. to the value of £ , and have exposed them to sale from day to day, and have thereof sold to the value of £ , which money I have ready before Our Lady the Queen at the day and place within mentioned, to be rendered to the within-named A. B. as I am within commanded; and the residue of the said goods and chattels remain in my hands unsold for want of buyers. (*If the value returned be less than the amount of moneys and interest ordered to be levied by the writ make a return nulla bona for the residue, as in Form No. 3, supra.*)

The answer of S. S., Esq., Sheriff.

11. *Return of Seizure under a prior Writ, and that Goods are in hand Unsold for want of Buyers.*

I certify and return to the within writ, that, before the delivery to me thereof, another writ of *feri facias* of Our Lady the Queen was on delivered to me, against the goods and chattels of the within-named C. D. in my bailiwick, at the suit of W. W. returnable before Our Lady the Queen in the Division of the High Court of Justice immediately after the execution thereof for £ , together with interest as therein mentioned and indorsed to levy £ , besides [*&c. as in indorsement*]: And I further certify and return, that by virtue of the within writ, I caused to be seized and taken in execution goods and chattels of the said C. D. in my said bailiwick, of the value of £ , which said goods and chattels remain in my hands unsold for want of buyers. And I further certify and return, that the said C. D. hath not any other or more goods or chattels in my said bailiwick whereof I can cause to be made the moneys [or "£ "] and interest within-mentioned, or any part thereof as I am within commanded.

The answer of S. S., Esq., Sheriff.

12. *The Like, and that the Defendant is a Beneficed Clerk.*

The within-named C. D. has no goods or chattels, or any lay fee, in my bailiwick which I can seize or take, or pay or deliver to the

within named A. B. or whereof I can cause to be made the moneys [or “£ ”] and interest within mentioned, or any part thereof, as I am within commanded, but I do hereby certify, that the said C. D. is a beneficed clerk, to wit, rector of the rectory [or “vicar of the vicarage”] and parish church of in my county, which said rectory [or “vicarage”] and parish church are within the diocese of the reverend father in God , by divine permission lord bishop of [or “within the peculiar jurisdiction of the very reverend the dean and chapter of the cathedral church of St. Peter of York, and instituted to try them as ordinary,” *as the case may be*].
The answer of S. S., Esq., Sheriff.

13. *Return of Mandavi Ballivo.*

By virtue of this writ to me directed, I made my mandate to the bailiff of the liberty of , in my county, to whom belongeth the execution and return of all writs and processes within the said liberty, and without whom no execution of this writ could be made by me within the same, which said bailiff hath returned to me, that by virtue of my said mandate to him thereupon directed as aforesaid, he hath caused to be made of the goods and chattels of the within named C. D. the moneys [or “£ ”] and interest within mentioned, and that he hath that money ready before Our Lady the Queen at the day and place within mentioned, as by my said mandate it was commanded.

The answer of S. S., Esq., Sheriff.

Fees.

See under “Sheriffs’ Fees, &c.,” *post*, p. 506.

CHAPTER V.

WRIT OF ELEGIT.

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Introductory.

ELEGIT, the writ used when the judgment creditor desires to proceed against the lands of the debtor, is the third of the writs of execution enumerated in Ord. XLII. r. 8, of the Rules of the Supreme Court, and derives its name from the words in the form “chose (*elegit*) to be delivered to him.” Under a writ of *fi. fa.* the goods are sold and the proceeds of the sale paid to the creditor in satisfaction of his debt; but under a writ of *elegit* the lands and (formerly) the goods themselves are delivered into the hands of the creditor at a valuation. The provisions of Ords. XLII. and XLIII., and of the statutes 29 Car. 2, cc. 3, 7; 13 Eliz. c. 5, and 50 & 51 Vict. c. 55, apply equally to *elegit* and *fi. fa.*, in which connection therefore see under title “Writ of *Fieri Facias*,” *ante*, pp. 52 *et seq.*

On receipt of the writ the sheriff must indorse upon it the date of delivery as required by the Statute of Frauds, and also, if required, give the receipt prescribed by sect. 10 of the

Date to be
indorsed and
receipt given,
if required.

Sheriffs Act, *ante*, p. 57. Under the old law (Statute of Westminster, 13 Edw. I. c. 18), this writ extended to the debtor's goods and chattels, except his oxen and beasts of the plough, and one-half of his lands; but since 1 & 2 Vict. c. 110, it has extended to the whole of his lands; while sect. 146 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides that it shall not extend to goods. It is not, therefore, intended to discuss that branch of the subject in this work, but the reader may be referred to the last important case bearing on the matter, *Ex parte Abbott*, 15 Ch. D. 447, and to *Hough v. Windus*, 12 Q. B. D. 224, where the above section of the Bankruptcy Act was considered.

Process of
execution of
writ.

The writ having been delivered to the sheriff of the county in which the lands are situated, he must forthwith proceed to summon and impanel a jury to inquire what the lands are and to ascertain their value. The inquisition having been held the sheriff then makes a return to the writ, in which he states that he has delivered the lands to the judgment creditor. The return is the delivery of possession, and vests the land in the judgment creditor until the debt and interest is satisfied (*a*), and whenever this is done the judgment debtor enters into his land again. "The sheriff does not give the creditor actual possession of the land itself, but the effect of his return is, that it vests the legal estate in the creditor. The creditor can then bring ejectment, if it is an estate in possession, or he can sue for the rent, if it is a reversion." *Per Mellish, L. J., in Hatton v. Haywood* (L. R. 9 Ch. 236). If the interest of the debtor in the lands consists of an equitable interest which is not extendible at law, a receiver will be appointed by the Court on the application of the creditor. The relief granted by the appointment of a receiver, which is commonly called "equitable execution," is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law. *Atkins v. Shephard*, 43 Ch. D. 131. Since the coming into operation of the Judicature Act, 1873 (36 & 37 Vict. c. 66), it is not necessary for a judgment creditor, who seeks to obtain a receiver of his judgment debtor's equitable interest in land, previously to sue out an *elegit* (*Ex parte Evans, In re Watkins*, 13 Ch. D. 252), and the Court may even grant a receiver where the

(*a*) For the purposes of the Bankruptcy Act execution is completed by seizure and the creditor's title is completed, and delivery in execution is "a seizure," although no return is made to the writ. *Re Hobson*, 33 Ch. D. 493; 55 L. J. Ch. 754.

party applying has a legal remedy, and could have obtained possession under an *elegit* (b). *In re Pope*, 17 Q. B. D. 743; 55 L. J. Q. B. 522.

By 1 & 2 Vict. c. 110, s. 13, judgments are to operate as a charge on real estate, subject to such charge not being enforceable until after the expiration of one year, and to the protection given by courts of equity to purchasers for valuable consideration without notice. By 2 & 3 Vict. c. 11, s. 5, as against purchasers and mortgagees without notice, no judgments, &c.," "shall bind or affect any lands, tenements or hereditaments or any interest therein further or otherwise or more extensively in any respect, although duly registered than a judgment of one of the superior Courts aforesaid, would have bound such purchaser or mortgagee before the said Act of the first and second years of the reign of her present Majesty, where it has been duly docketed according to the law then in force;" whilst sect. 4 of that Act contains a provision for re-registration of judgments, &c., every five years. By 3 & 4 Vict. c. 82, s. 2, no judgment, decree, &c., is to affect real estate as to purchasers, mortgagees, or creditors, unless and until registered as therein mentioned, "any notice of any such judgment, decree, order or rule to any such purchaser, mortgagee or creditor in anywise notwithstanding."

Effect of judgments, &c., on the land.

By 18 Vict. c. 15, s. 4, no judgments, &c., registered under 3 & 4 Vict. c. 82, are to affect lands, &c., as to purchasers, &c., until registered; and by sect. 5, purchasers, mortgagees and creditors are protected against judgments not re-registered as to lands, &c., notwithstanding notice of such judgments, &c. As to judgments entered up after the 23rd of July, 1860, it is provided by 23 & 24 Vict. c. 38, ss. 1 and 2, that, to affect lands, &c., of whatever tenure as to *bonâ fide* purchasers for valuable consideration, or mortgagees with or without notice of the judgment, &c., writs of execution thereof must be registered before the execution of the conveyance or mortgage, and payment of the conveyance or mortgage-money as therein mentioned. As to judgments entered up after the 29th of July, 1864, by 27 & 28 Vict. c. 112, ss. 1 and 3, such judgments are not to affect land of whatever tenure until it shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment, &c.,

(b) For further information on the subject of equitable execution, see *Edwards on Execution*.

and such writs of execution shall be registered in manner prescribed by 23 & 24 Vict. c. 38. And with regard to the necessity of actual delivery in execution under the writ of *elegit*, 27 & 28 Vict. c. 112, makes no distinction in that respect between hereditaments corporeal and incorporeal, and equitable interests in land are also within that Act. *Hatton v. Haywood*, L. R. 9 Ch. 229; 43 L. J. Ch. 372. And see as to actual delivery in execution within the meaning of 27 & 28 Vict. c. 112, *In re Rush*, L. R. 10 Eq. 442; 39 L. J. Ch. 759; and *Backhouse v. Siddle*, 38 L. T. 487.

Writs and orders affecting land to be registered,

and to be void against purchasers unless registered.

And now the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), provides, in section 5, for the establishment of an Office of Land Registry, where writs and orders affecting land must be registered and re-registered every five years; and section 6 renders void as against purchasers (including mortgagees, lessees, or other persons who, for value, take any interest in land, or in a charge on land), any writ and order and delivery in execution or other proceeding taken in pursuance of such writ or order, unless so registered. This last section also contains a saving clause to protect the operation of a writ or order registered under 27 & 28 Vict. c. 112, until the expiry of the period for which it is registered.

Shortly, judgments entered up prior to the 23rd of July, 1860, bind the land subject to the provisions for registration and for the protection of purchasers and mortgagees set out above; judgments entered up between the 23rd of July, 1860, and the 29th of July, 1864, do not bind the land until a writ of execution is issued and registered; judgments subsequent to the 29th of July, 1864, do not affect land until actually delivered in execution; and the Act of 1888 (*ante*), requires the delivery in execution and other proceedings to be registered in the Office of Land Registry.

By 27 & 28 Vict. c. 112, ss. 4 and 5, a creditor, to whom land is delivered in execution, is entitled to obtain, upon petition in a summary way, a summary order for sale of his debtor's interest in such land, subject to service of notice of such order for sale on any other creditors entitled to the benefit of a charge on such land through a judgment debt, &c.; and parties claiming any interest in such land through the debtor by any means subsequent to the delivery of such land in execution as aforesaid are bound by such order for sale. And see *In re Pope*, 17 Q. B. D. 743; 55 L. J. Q. B. 522.

Forms of Writ.

1. *Writ of Elegit*. (Form No. 3, App. H. of R. S. C. 1883, altered in accordance with the provisions of the Bankruptcy Act.)

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Sheriff of greeting :

Whereas lately in our High Court of Justice in a certain action [or certain actions *as the case may be*] there depending wherein A. B. is plaintiff and C. D. defendant [or in a certain matter there depending, intituled "In the matter of E. F." *as the case may be*] by a judgment [or order *as the case may be*] of our said Court made in the said action [or matter *as the case may be*] and bearing date the day of it was adjudged [or ordered *as the case may be*] that C. D. should pay unto A. B. the sum of £ together with interest thereon after the rate of £ per centum per annum from the day of together also with certain costs as in the said judgment [or order *as the case may be*] mentioned and which costs have been taxed and allowed by one of the taxing officers of our said Court at the sum of £ as appears by the certificate of the said taxing officer dated the day of .* And afterwards the said A. B. came into our said Court and according to the statute in such case made and provided chose to be delivered to him all such lands, tenements, rectories, tithes, rents and hereditaments including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D. or any one in trust for him was seised or possessed of on the day of in the year of Our Lord * or at any time afterwards, or over which the said C. D. on the said day of or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively according to the nature and tenure thereof to him and to his assigns until the said two several sums of £ and £ together with interest upon the said sum of £ at the rate of £ per centum per annum from the said day of and on the said sum of £ (*costs*) at the rate of £4 per centum per annum from the day of shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price (*d*) and extent (*e*) all such lands and tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D. or any person or persons in trust for him was or were seised or possessed of on the said day of * or at any time afterwards or over which the said C. D. * or at any time afterwards had any disposing power which he might without the assent of any

*The day on which the judgment or order was made.

*As above.

*Do.

(*d*) "Price" refers to goods and chattels, which, it will be observed, cannot now be seized under this writ.

(*e*) "Extent" refers to lands.

other person exercise for his own benefit to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof to him and to his assigns until the said two several sums of £ and £ together with interest as aforesaid shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid immediately after the execution thereof under your seals and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness, &c.

2. *Writ of Elegit.* (Form No. 141, C. O. R. 1886.)

VICTORIA by the grace of God, &c.

To the Sheriff of greeting.

Whereas lately in the Queen's Bench Division of our High Court of Justice in a certain (*f*) wherein A. B. is (*g*) and C. D. is defendant by a (*h*) of our said Court made in the said (*f*) and bearing date the day of 18 , it was (*i*) that the said should pay unto certain costs as in the said (*h*) mentioned and which costs have been taxed and allowed at the sum of £ as appears by the allocatur of one of the taxing masters dated the day of 18 . And afterwards the said came into our said Court and according to the statute in such case made and provided chose to be delivered to him all such lands tenements rectories tithes rents and hereditaments including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said or any one in trust for him was seised or possessed of on the (*k*) day of or at any time afterwards or over which the said on the said day of 18 , or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit to hold the said lands tenements rectories tithes rents and hereditaments respectively according to the nature and tenure thereof to him and to his assigns until the said sum of £ (*l*) together with interest upon the said sum at the rate of £4 per centum per annum from the (*k*) day of shall have been levied. Therefore we command you that without delay you cause to be delivered to the said by a reasonable price and extent all such lands and tenements rectories tithes rents and hereditaments including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said or any person or persons in trust for him, was or were seised or possessed of on the said (*k*) day of or at any time afterwards or over which the said on the said (*k*) day of or at any time afterwards had any

(*f*) Indictment, information (in the nature of a *quo warranto*), action of mandamus, or matter there depending, intituled "In the matter of, &c.," or as the case may be.

(*g*) Prosecutor, relator, plaintiff or appellant, as the case may be.

(*h*) "Judgment" or "order."

(*i*) "Adjudged," "awarded" or "ordered."

(*k*) Date of judgment or order.

(*l*) Costs.

disposing power which he might without the assent of any other person exercise for his own benefit to hold the said lands tene-ments rectories tithes rents and hereditaments respectively according to the nature and tenure thereof to him and to his assigns until the said two several sums and interest as aforesaid shall have been levied. And in what manner you shall have executed this our writ make known to us in our Court aforesaid immediately after the execution thereof under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness &c.

(*To be indorsed.*)

Levy £ and £ for costs of execution besides costs of inquisition, if any; and also interest on £ at £4 per centum per annum from the day of 18 , until payment besides sheriff's poundage, officers' fees, costs of levying and all other legal incidental expenses.

This writ was issued by M. N. of L. agent for G. H. of Y. solicitor for who resides at

The within-named A. B. is a and resides at in your bailiwick.

3. *Elegit for the Residue after a Fieri Facias.*

VICTORIA [*§c. as in Form No. 1, ante, p. 103.*] To the Sheriff of greeting: Whereas lately in our High Court [*§c. proceed as in a common elegit, as in No. 1 to the asterisk**], and whereupon by our writ we lately commanded you, that of the goods and chattels [*§c. recite the fieri facias*] and you on returned [*§c. recite the return as the case may be*]; and afterwards the said A. B. came into our said Court, and according to the statute in such case made and provided, chose to be delivered to him [*§c. as in No. 1 to the words "and his assigns" and then thus:*] until the sum of £ , residue of the said £ and interest aforesaid, should be thereof fully levied: Therefore we command you [*§c., proceed as in a common elegit to the words "to him and to his assigns"*], until the said £ residue of the said several sums of £ and £ , together with interest aforesaid, shall have been levied: And in what manner you shall have executed this our writ [*§c. conclude as in No. 1*].

4. *Writ of Re-Elegit.*

VICTORIA [*§c. as in Form No. 1, ante, p. 103.*] To the Sheriff of greeting. Whereas lately in our High Court [*§c., recite the first writ*]. And you on [*day of filing the return*] returned to us in the Division of our High Court of Justice, a certain inquisition, indented taken before you at on the day of last past by the oath, &c., whereby it is found [*§c. reciting the return in the past tense*]: And because we are now given to understand in our said Court, that the said C. D. at the time of giving the judgment aforesaid, and afterwards had and still hath divers other lands, tenements, rectories, tithes, rents and heredita-

ments in your bailiwick, besides those which are mentioned in the return above set forth, which said other lands, tenements, rectories, tithes, rents, and hereditaments, the said A. B. ought also to have in execution for the more speedy recovery of the said £ and £ , and interest aforesaid; therefore the said A. B. hath humbly besought us that he may so have them, according to due course of law: Therefore we command you that you cause to be delivered to the said A. B. in the presence of the said C. D. to be warned on that occasion, if he will attend, all the other lands, tenements, rectories, tithes, rents and hereditaments of the said C. D. in your bailiwick, as well as those before extended in execution, for the payment of the said several sums of £ and £ and interest aforesaid, to hold to the said A. B. and his assigns, according to the nature and tenure thereof, according to the form of the statutes aforesaid, until the said several sums of £ and £ and interest aforesaid, shall be thereof fully levied: And in what manner you shall have executed this our writ [*&c. conclude as in Form No. 1*].

Execution of Writ.

Inquisition.

Sheriff to
appoint time
for execution
and impanel
jury for in-
quisition.

Upon receipt of the writ the sheriff must appoint a time for its execution, and impanel a jury to inquire as to the lands and tenements, &c. of the debtor and their value. The execution creditor or his solicitor must attend at the appointed time and place with his witnesses, whose attendance may be compelled by *subpoena*, or other evidence to show what lands, &c. the defendant has, their nature and annual value. The jury must be charged and the oath administered to them (see Forms, *post*, p. 107) and the inquisition returned in accordance with the command of the writ. The jury is summoned in a similar manner to a jury on a writ of inquiry. The proceedings on an inquiry under the writ of *elegit* are somewhat like those on a writ of inquiry, but it seems that no notice of the inquisition need be given to the judgment creditor. *Steed v. Layner*, 2 Ld. Raym. 1382. As to the holding of courts by the sheriff for the purpose of the execution of writs, see the Sheriffs Act, 1887, sect. 18, under the title "Writ of Inquiry," *post* p. 407.

Evidence to
be given at
inquisition.

According to Chitty's Archbold, as the proceeding is an *ex parte* one, and the inquisition not conclusive on the debtor, it is in general sufficient to give slight evidence of the debtor's title. The inquisition may be prepared beforehand, according to the facts, with blanks to be filled in upon execution, and the

sheriffs and jurors will seal it immediately after the taking of the inquisition.

Upon an inquisition on a writ of *elegit*, proof of possession or receipt of the rent of the land by the party is *prima facie* evidence of title; and where a jury, notwithstanding such evidence, found that the party had no lands, the Court set aside the finding, and directed the sheriff to take a new inquisition. *Barnes v. Harding*, 1 C. B. N. S. 568.

If the sheriff extend lands, &c. not extendible by law, and also extend lands which are extendible, the inquisition may be good as to the latter, though bad as to the former. *Morris v. Jones*, 3 D. & R. 603.

As to setting aside or impugning an inquisition, see *Pullen v. Purbeck*, Salk. 563; 12 Mod. 368; *S. C. Barnes v. Harding*, *supra*; *Doe d. Evans v. Owen*, 2 Cr. & J. 71, and *Fenny v. Durrant*, 1 B. & A. 40 and 41. Setting aside
inquisition.

Charge to the Jury.

Your charge is to inquire what lands tenements rectories tithes rents and hereditaments including lands and hereditaments of copyhold or customary tenure C. D. or any one in trust for him was seised or possessed of on the day of A.D. 18 (m) or at any time afterwards, or over which the said C. D. on the day of A.D. 18 or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit and also to inquire and say what is the yearly value thereof that the same may at a reasonable price and extent be made to be delivered to A. B. to hold the said lands tenements rectories tithes rents and hereditaments respectively, according to the nature and tenure thereof, to him and his assigns until the said sum of £ together with interest as aforesaid shall have been levied.

Juror's Oath and Affirmation.

You shall well and truly try what lands tenements rectories tithes rents and hereditaments including lands and hereditaments of copyhold or customary tenure C. D. or any one in trust for him, was seised or possessed of on the day of A.D. 18 (m) or at any time afterwards or over which the said C. D. on the day of A.D. 18 or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit in my bailiwick, and the yearly value thereof and a true verdict give according to the evidence.

So help you God.

(m) The day of entry of judgment, or date of order, decree, &c.

What may be extended.

Sheriff
empowered
to deliver
execution of
lands, &c. to
judgment
creditor.

By 1 & 2 Vict. c. 110, s. 11, "It shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this Act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's Superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by *elegit* is now subject to in a Court of Equity: Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform, and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied."

Proviso as
to copyhold
lands.

Chitty's Archbold, 14th edit. p. 876, states that a moiety only should be extended where a purchaser or mortgagee without notice is entitled under 2 & 3 Vict. c. 11, s. 5, but it is conceived

that this case can scarcely ever arise now, because, as already shown, no judgment entered up since the 26th of July, 1864, can affect land until actual delivery in execution.

Equitable estates were not at common law liable to be taken in execution upon a judgment against the *cestui que trust* (Co. Lit. 374 b), but 29 Car. 2, c. 3, s. 10, provides that the sheriff shall "do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seised and possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued had been seised of such lands, &c., of such estate as they be seised of in trust for him at the time of the said execution sued; which lands, &c., by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued." A judgment affects the legal estate of a party from the time it is signed, but, on account of the wording of the above section, it affects only such trust property as the judgment debtor is possessed of at the time execution is sued out, so that such trust property cannot be taken under an *elegit* sued out after a conveyance of it, grounded on a judgment signed before such conveyance. *Harris v. Pugh*, 4 Bing. 335; 12 Moore, 577. It should be noted that the wording of 1 & 2 Vict. c. 110, s. 11, which renders trust property in lands of copyhold or customary tenure liable to be taken in execution, is different. And see 27 & 28 Vict. c. 112. It has been held that the above section applies only to cases where the trustees hold in trust for the defendant alone, and not where the trust is for the defendant and another jointly. *Doe d. Hull v. Greenhill*, 4 B. & Ald. 684; *Harris v. Pugh*, 4 Bing. 335; *Gore v. Bowser*, 24 L. J. Ch. 316, 440. An equity of redemption cannot be taken under this section, for in the words of Jessel, M. R., in *The Anglo-Italian Bank v. Davies*, 9 Ch. D. at p. 284, "The Statute of Westminster was extended by the Statute of Frauds only to the case of pure equities, that is, where there was a bare trust, and not an estate like an equity of redemption." See *Lyster v. Dolland*, 1 Ves. jun. 431; 3 Bro. C. C. 478; *Hutton v. Haywood*, L. R. 9 Ch. 229; *Salt v. Coover*, 16 Ch. D. 544. It has also

Lands, &c. to be liable to the judgments, &c. of *cestui que trust*.

been held that an equitable interest in a term is not within the statute, which extends only to trusts in fee. *King v. Ballett*, 2 Vern. 248; *Scott v. Scholey*, 8 East, 467; and see *Jeffreson v. Morton*, 2 Saund. 11. But an outstanding term, vested in a trustee upon trust to attend the inheritance, may be taken in an execution against the owner of the inheritance. *Doe d. Phillips v. Evans*, 1 C. & M. 450.

Estates in reversion on leases for lives or years may be extended as also lands held in ancient demesne.

Estates in reversion on leases for lives or years (*Poole (Mayor, &c. of) v. Whitt*, 15 M. & W. 571; 16 L. J. Ex. 229) may be extended, so also may "lands held in ancient demesne delivered over on an *elegit*. Although the word 'lands' is used in the statute (1 & 2 Vict. c. 110), yet whatever comes under the legal definition of a tenement was always extendible on an *elegit*, as a reversion or rent charge. . . . Lands, which the defendant hath by extent upon a statute, are liable to be taken on an *elegit*. . . . So may the lands which a husband has in right of his wife." 2nd ed. Wats. on Shf. Law, pp. 308, 309.

Bishop's lands.

The lands of a bishop may be extended under this writ. Dalt. 136. The subject-matter must, however, be a legal estate, and not a mere equitable interest, such as an equity of redemption. *Hatton v. Haywood*, ante; *Davis v. Marlborough*, 2 Swans. 122.

Leaseholds and terms of years.

Leaseholds or terms of years may still be extended under an *elegit*, and do not fall within the 146th section of the Bankruptcy Act, 1883, goods in that Act being defined (sect. 168) as chattels personal. And see *Richardson v. Webb*, 76 L. T. O. S. 397. It was there held that, as sect. 168 defines goods to include "all personal chattels" and leaseholds are chattels real, therefore they do not come within sect. 146, which provides that "the sheriff shall not, under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods." A term of years may either be extended at an extended annual value as part of the debtor's lands, or it may be delivered to the creditor, the jury having first appraised it at the gross sum, and the creditor becomes the absolute owner of the term at the appraised value.

Mansion house.

A mansion-house, excepted from the leasing power of a tenant for life, is subject to execution at the suit of his creditors during his life. *Davis v. Marlborough*, 2 Swans. 122.

Estates granted for maintenance of dignities.

Estates granted by the Crown for the maintenance of dignities, with reversion in the Crown, have the usual incidence, and may be taken in execution. *Id.*

Land held and used by a local board of health for public purposes is also liable to be taken under a writ of *elegit* under a judgment against such board. *Worral Waterworks Co. v. Lloyd*, L. R. 1 C. P. 719; *Coe v. Wise*, L. R. 1 Q. B. 711; and see *Earl Jersey v. Uxbridge Rural Sanitary Authority*, [1891] 3 Ch. 183; 60 L. J. Ch. 833; 64 L. T. 858.

"The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased or as to any other property not specifically released without prejudice nevertheless to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or conforming to the release." 22 & 23 Vict. c. 35, s. 11.

Land held by Local Board for public purposes.

Release of part of land charged not to affect judgment.

What may not be extended.

"A rent seek, or an office, as that of filazer, are not extendible." *Walsall v. Heath*, Cro. Eliz. 656; *Heydon's Case*, 2 Rep. 18; *Anon.*, Dyer, 7. "An office is not extendible because it cannot be granted over. . . . Lands, of which the defendant is disseised in the hands of the disseisor, are not liable to be taken on an *elegit*. Neither is an advowson in gross, because a moiety of it could not be set out, nor can it be valued at any certain rent towards payment of the debts (see *Robinson v. Tongue*, 3 P. Wms. 401); nor the glebe of a parsonage or vicarage; nor can a churchyard be extended under an *elegit*, although it is said that the lands of a bishop may be extended. . . . The execution creditor is not entitled to rent which becomes due after the delivery to the sheriff of an *elegit* but before inquisition taken." 2nd ed. Wats. pp. 308, 309, and 310, and cited authorities. As already stated, an equity of redemption cannot be taken, *ante*, p. 109.

Rent-seek, &c.

Lands, disseised, in hands of disseisor.

Advowson in gross.

Glebe.

Churchyard.

An estate in remainder, belonging to an infant, cannot be extended under an *elegit*. *South, In re*, 9 L. R. Ch. 369; 43 L. J. Ch. 441; 30 L. T. 347; reversing the decision of *Malins, V.-C.*, 22 W. R. 388. Nor can any other remainder, as distinguished from a reversion. "The sheriff is only empowered to seize those lands of which the debtor is 'seised or possessed.' A man cannot be seised or possessed of a remainder." *Per James, L. J.*, at p. 373 of the report in L. R. 9 Ch.

Infant's estate in remainder.

Remainders.

"Where any legal or equitable estate or interest or any disposing power in or over any lands, tenements or hereditaments shall, under any conveyance or other instrument executed

Legal estate vested in purchaser or mortgagee not to be

taken in
execution.

after the passing of this Act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements or hereditaments shall not be taken in execution under any writ of *elegit*, or other writ of execution, to be sued upon any judgment, or any decree, order, or rule against any mortgagee or mortgagees thereof, who shall have been paid off prior to or at the time of the execution of such conveyance, nor shall any such judgment, decree, order, or rule, or the money thereby secured, be a charge upon such lands, tenements, or hereditaments so vested in purchasers or mortgagees." 18 Vict. c. 15, s. 11; and see *Greaves v. Wilson*, 4 Jur. N. S. 802; 28 L. J. Ch. 103.

Where lands are extended under an *elegit*, there is no interest in them left in the debtor which can be extended under a subsequent writ. *Carter v. Hughes*, 2 H. & N. 714; 27 L. J. C. P. 225.

The law is well and clearly summed up in Prid. Prec. 15th ed. at pp. 143, 144, as follows:—

"Every legal estate or interest in land in possession or reversion, if vested in the debtor beneficially, or if he has a power of disposition over it exerciseable for his own benefit, is extendible at law. So also is land vested in a trustee on a bare trust for the debtor, where the debtor has the whole beneficial interest. So also are impropriate rectories and tithes, but not a rectory or tithe constituting an ecclesiastical benefice, nor an advowson in gross, nor an estate in remainder."

Adverse Claims.

Judgment
creditor takes
legal estate
subject to any
equity.

The existence of an equitable mortgage upon the land is no bar to the execution of the *elegit*, but where the legal estate of the debtor is subject to any equity, the judgment creditor will take subject to that equity; in other words, will take whatever beneficial interest the debtor has and no more. 14th ed. Chit. Arch. 877; and 15th ed. Prid. Prec., pp. 143 and 144. But notwithstanding 1 & 2 Vict. c. 110, s. 11, which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an *elegit* without notice of the mortgage. *Whitworth v. Gaugain*, 1 Ph. 728; 10 Jur. 531; 15 L. J. Ch. 433.

A judgment creditor of a railway company, who had obtained an *elegit*, was restrained from taking possession of the lands and chattels belonging to the company as against prior mortgagees, to whom were assigned the undertaking, calls on shareholders, and tolls. *Legg v. Mathieson*, 2 Giff. 71; 6 Jur. N. S. 1010.

A judgment creditor is not a purchaser within the meaning of the statute 27 Eliz. c. 4, and has, therefore, no title on that ground to set aside a prior voluntary settlement. Moreover, the 13th section of the Act 1 & 2 Vict. c. 110, does not confer on the judgment creditor any right against a person claiming under a voluntary settlement previously made by the judgment debtor. *Beavan v. The Earl of Oxford*, 6 De G. M. & G. 507; 25 L. J. Ch. 299.

Judgment creditor has no title against person claiming under prior voluntary settlement.

Several Writs and Priorities.

Priorities of judgment creditors against lands are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff. Therefore a judgment creditor, subsequent in point of date, but who was the first to place his writ in the hands of the sheriff and get the lands of the debtor extended under such writ, was, in the undermentioned case, held entitled in priority to a prior judgment creditor whose writ was subsequently placed in the sheriff's hands before the lands were extended. *Guest v. Cowbridge Rail. Co.*, L. R. 6 Eq. 619; and see judgment of Sir G. M. Giffard, V.-C., in that case; and *Whitworth v. Gaugain*, 3 Hare, 416; 1 Ph. 728.

Priority determined by dates of delivery of writs to sheriff.

Where an execution by *elegit* is perfected and completed by delivery of the lands before the Crown's writ issued, the subject's title is prior to the Crown's and is executed. *Per* Lord Chief Baron Steel in *Attorney-General v. Andrew*, Hard. 23; and *per* Patteson, J., in *Giles v. Grover*, 1 Cl. & F. 86, 87.

Crown's writ.

The judgment creditor may have more than one writ of *elegit* directed into different counties (see headings "Concurrent and Successive Writs" in the chapter on *Fi. Fa.*, *ante*, pp. 65, 66); but it appears that where land is extended under a writ of *elegit*, no writ other than an *elegit* can be sued out against the debtor or his property. Bro. Abr. *Elegit*, 15; Chitty's Arch., 14th ed., p. 885.

Further, as to priorities, see chapters on "Landlord's Claim for Rent," and "Bankruptcy, &c.," *post*, pp. 285, 349.

Finding of the Inquisition.

The inquisition ought to find the lands with convenient certainty. It must show the place and county where they lie and where the inquisition is taken, what estate the debtor has, and whether in severalty, joint tenancy, or tenancy in common. . . . But since the statute 1 & 2 Vict. c. 110, it is not necessary to set out the premises by metes and bounds; it is sufficient to describe them by name, or in some other manner with such a degree of accuracy that they may be readily identified. 2nd ed. Watson on Sheriffs, p. 312; Chitty's Arch., 14th ed. 884; *Doe d. Roberts v. Parry*, 13 M. & W. 356; *Sherwood v. Clarke*, 15 M. & W. 764; *Poole (Mayor of) v. Whitt*, 15 M. & W. 571.

Delivery of the Lands.

After the inquisition the sheriff must deliver to the execution creditor sufficient of the execution debtor's lands and tenements (*i.e.*, the legal not the actual possession of such lands, &c., or, in other words, a right of entry only) at the jury's valuation thereof, for satisfaction of the levy.

Return.

A return
must be made.

The sheriff must always make a return to a writ of *elegit* if he has done anything under it. If he did not do so the tenant by *elegit* would have no title. But see *In re Hobson*, 33 Ch. D. at p. 496.

Return of
"nihil."

Where the sheriff is unable to execute the writ in consequence of the debtor's interest in the land being merely equitable, the proper form of return is "*nihil*." *Hatton v. Haywood*, 43 L. J. Ch. 372; 9 L. R. Ch. 229. If it be returned to an *elegit* that there are no lands, the sheriff need not return an inquisition. *Stonchouse v. Even*, 2 Stra. 874. In such case the proper return is *nihil*.

Return of
"mandari
ballivo."

"*Mandari ballivo* is a good return to a writ of *elegit*, and it is a good return that the sheriff has extended the lands of the defendant, but could not deliver them to the plaintiff, for another had them in extent before." 2nd ed. Watson, p. 315.

The Court will not alter the return of an *elegit* to a later day, at all events, not at the instance of the sheriff without the consent of the plaintiff. *Hildyard v. Baker*, 1 C. & M. 611.

The inquisition is remitted with the return, and the *elegit* and inquisition must be filed in the Court out of which the *elegit* issued.

FORMS OF RETURN.

1. *Return to Elegit that Defendant has no Lands, &c.*

The within-named defendant has no lands, tenements, rectories, tithes, rents or hereditaments in my bailiwick whereof I can cause to be levied the £ [or "moneys"] and interest within mentioned or any part thereof as I am within commanded.

The answer of S. S., sheriff.

2. *Return of Inquisition where Lands are extended.*

The execution of this writ appears in the inquisition hereunto annexed.

The answer of S. S., sheriff.

— to wit. An inquisition indented, taken at [] in the county of [], the [] day of [] A.D. [] before me S. S. sheriff of the county aforesaid, by virtue of her Majesty's writ to me directed in this behalf and to this inquisition annexed, by the oath of [name the jurors upon the inquest] twelve honest and lawful men of the county aforesaid, who being [duly impanelled, drawn by ballot] sworn and charged, say, upon their oath that C. D. named in the said writ to this inquisition hereunto annexed, on the day of taking this inquisition [or "one [] in trust for the said C. D."] on the [] day of [] in the year of our Lord 18 [] was [or "is"] seised in his demesne as of fee [or "of freehold for and during the term of his natural life"] of and in one messuage and one close of pasture land thereto adjoining, with the appurtenances, containing by estimation [] acres, more or less, situate, lying and being in the parish of [] in the county aforesaid, and now or late in the tenure or occupation of [], and being of the clear yearly value of £ [] in all issues beyond reprises, and also of and in one other close [&c. as above]. *If the defendant was a joint tenant, tenant in common, or coparcener say:* "that the said C. D. [&c.] on [&c.] was seised in his demesne as of fee [or 'of freehold for and during the term of his natural life'] of and in one undivided moiety [or 'part'], the whole into two equal moieties [or 'parts'] to be divided of and in one messuage [&c. as above]." *If the premises are in mortgage for a term of years, add:* "which said messuage, &c. [or 'undivided moiety,' &c.] are subject to a mortgage made thereof by the said C. D. to one E. F. of [], by indenture bearing date [&c.] for the term of [] years, at the yearly rent of one peppercorn subject to redemption or payment of £ [] and interest at five pounds per centum per annum at a day since past." *If the lands, &c., are copyhold, say:* "that the said C. D. [&c.] on [&c.] was seised in his demesne as of fee at the will of the lord, according to the custom of the manor of [] in the county of [] of and in one close [&c. as above], the same being within and parcel of the said manor and a customary tenement of the same manor, demised and demisable by copy of the court-roll of the said manor by the lord of the said manor or by his steward of the courts of the said manor for the time being to any person or persons willing to take the same in fee simple or otherwise at the will of the lord, according to the custom of the said manor." *If there be a rectory, say:* "that the said C. D. [&c.] on [&c.] was seised in his demesne as of freehold

for and during the term of his natural life of and in the rectory of the parish church of in the county aforesaid." *Or if there be tithes*, "that the said C. D. on [§c.] was seised as of fee and right of and in all and singular the tithes of corn, grain, hay, wood, grass, wool, lambs and calves [*as the case may be*] arising, growing, renewing, increasing, and happening within the parish of in the county aforesaid and within the bounds, limits, and titheable places of the said parish." *If there be a rentcharge*, say: "that the said C. D. [§c.] on [§c.] was seised as of fee and right [*or 'of freehold for and during the term of his natural life'*] of and in a certain annuity, yearly rent or sum of £ of lawful money of Great Britain, payable by four equal quarterly payments [*or otherwise as the case may be*] on [§c., specifying the days of payment] and charged and chargeable upon and issuing and payable out of certain freehold lands and premises, with the appurtenances, situate and being in the parish of in the county aforesaid." *If the defendant had a disposing power over lands, &c.*, say: "that the said C. D. on [§c.] had a disposing power over one messuage, &c. [*as before, stating the nature of the power and by what means and for what purpose it was created*], which power he, the said C. D. might without the assent of any other person have exercised for his own benefit, which said messuage, &c. [*or 'moiety,' &c., according to the fact*] respectively I the said sheriff on the aforesaid day of taking this inquisition have caused to be delivered to the said A. B. by a reasonable price and extent, subject as aforesaid [*if in mortgage*] to hold according to the nature and tenure thereof to him and his assigns according to the form of the statutes in such case made and provided, until the said several sums of £ and £ in the said writ mentioned together with interest upon the same as therein also mentioned shall have been levied." And lastly the jurors aforesaid upon their oath aforesaid say, that the said C. D. in the said writ named, on the aforesaid day of taking this inquisition, had not nor any person in trust for him on the said day of in the year of our Lord, 18 or at any time afterwards any other or more lands or tenements, nor any rectory, tithes, rents, or hereditaments, in the county aforesaid, whereof he, the said C. D. [§c.] was seised or possessed at the time of entering up the said judgment or at any time afterwards nor had he the said C. D. at the time of entering up such judgment or at any time afterwards any other or more lands [§c.] in the county aforesaid over which he had any disposing power which he might without the assent of any other person have exercised for his own benefit to the knowledge of the said jurors. In witness whereof as well I the said sheriff as the jurors aforesaid have set our seals to this inquisition on the day, year, and at the place aforesaid.

S. S., esquire, sheriff.

[*It should be sealed by the sheriff and jurors*].

J. J.	}	(Seals of the jurors).
K. K.		
J. M., §c.		

Fees.

See under "Sheriffs' Fees, &c.," *post*, p. 505.

CHAPTER VI.

WRIT OF VENDITIONI EXPONAS.

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Introductory.

THIS is a judicial writ addressed to the sheriff commanding him to expose to sale goods which he has already taken into his hands to satisfy a judgment creditor. This writ may also be issued for the sale of unclaimed property, taken under proceedings in outlawry.

“The legal and proper mode of compelling a sale by the sheriff, when he makes delay or refuses, is by writ of *venditioni exponas*, upon which he must return the money into Court”; per Lord Mansfield in *Cameron v. Reynolds*, Cowp. 406; and to quote Lord Ellenborough’s definition of this writ in *Keightley v. Birch*, 3 Camp. 521, “sell for the best price you can obtain.”

This writ is not a process distinct from the *fi. fa.*, but a part of it; it is a writ directing the sheriff to execute the *fi. fa.* in a particular manner. *Hughes v. Rees*, 4 M. & W. 468. By R. of S. C. 1883, Ord. XLIII. r. 2, “Where it appears upon the return of any writ of *fi. fa.* that the sheriff, or other officer, has by virtue of such writ seized, but not sold, any goods of the person directed to pay a sum of money, or costs, the person to whom such sum of money, or costs, is payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas*.” And by Rule 5 of same Order, “Writs of *venditioni exponas*,

distringas nuper vice comitem, fieri facias de bonis ecclesiasticis, sequestrari facias de bonis ecclesiasticis, and all other writs in aid of a writ of fi. fa. or of elegit, may be issued and executed in the same cases and in the same manner as heretofore."

Form of Writ.

(R. of S. C. 1883, App. H., No. 4.)

In the High Court of Justice.
Division.

18— [*Here put letter and number*].

Between A. B. - - - - - Plaintiff

and

C. D. - - - - - Defendant.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of greeting:

Whereas by our writ we lately commanded you that of the goods and chattels of C. D. [*here recite the fieri facias to the end*] And on the day of you returned to us in the Division of Our High Court of Justice aforesaid, that by virtue of the said writ to you directed, you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore we being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose to sale and sell or cause to be sold, the goods and chattels of the said C. D. by you in form aforesaid taken, and every part thereof for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Justice immediately after the execution hereof, to be paid to the said A. B. and have there then this writ.

Witness, &c.

Execution of Writ.

See foregoing directions under "Introductory."

Form of Warrant.

County of B. } esquire, sheriff of the county aforesaid to
to wit. } and my bailiffs greeting:

By virtue of Her Majesty's writ of *renditioni exponas* to me directed I command you that you immediately expose to sale and sell the goods and chattels late the property of which you have in your custody by virtue of a warrant to you directed on a writ of

issued of the Queen's Bench Division of Her Majesty's High Court of Justice at Westminster, at the suit of for provided nevertheless that you do not sell the said goods and chattels for a less sum than at which they were appraised so that I may retain the moneys arising from the sale thereof and have the same before the said High Court on in pursuance of the said writ. Hereof fail not. Given under the seal of my office this day of in the year of our Lord one thousand eight hundred and .

In selling under this writ the sheriff is not bound by the precise value stated in his return to the *fi. fa.* (*Wintle v. Chetwynd*, 7 D. P. C. 554), but if the goods are lost or rescued from him, he is bound by the value returned. *Clerk v. Withers*, 2 Ld. Raym. 1075.

"The sheriff ought to stop the sale of the goods as soon as a sufficient sum has been raised to cover the amount of the levy, expenses, &c., and after selling enough in fact for that purpose, he is not justified in selling more on the supposition that by accident for which he is not answerable the amount levied may become insufficient." 2nd ed. Wat. Sh. 271.

Return.

The form of return to this writ is that of the amount realized. In the case of a sheriff effecting a sale under this writ, he must make a return of the whole amount so obtained without deducting anything for extra expenses or poundage, and the Court, when ordering his payment out of such sale proceeds, deducts poundage, and on the sheriff's motion in that behalf, makes him any extra allowance to which he may be entitled. *Ree v. Jones*, 1 Price, 205.

A sheriff, having returned a levy under a *fi. fa.*, cannot return to the *venditioni* that he has sold the goods, but detains the money for another party under a prior writ of execution. *Rowe v. Tapp*, 9 Price, 317.

And see as to return, *Hughes v. Rees*, *supra*; *Reg. v. Sheriff of Berks*, 8 D. P. C. 97; *Leader v. Danvers*, 1 B. & P. 359; *Levy v. Hale*, 6 Jur. N. S. 702; 29 L. J. C. P. 127; and *Ree v. Monmouth (Sheriff)*, 1 Marsh. 344.

Sheriff's Liability.

Goods to be sold within reasonable time.

Attachment against sheriff.

A sheriff must sell the goods within a reasonable time and before the return of the *renditioni exponas*, or he will be liable to an action. *Jacobs v. Humphrey*, 4 Tyr. 272; 2 C. & M. 413.

The Court refused to grant an attachment against a sheriff for not selling goods under a *renditioni exponas*, where he had returned that he could not sell for want of buyers (*Anon.*, 2 Chit. 390); and when he had returned, that part of the goods levied remained in his hands for want of purchasers. *Leader v. Danvers*, ante, p. 119. Where several writs of *fi. fa.* at the suit of different persons against the same defendant were successively delivered to the sheriff, to the last of which he returned that he had seized goods which remained in his hands for want of buyers, but stated nothing about the previous writs, the Court afterwards relieved the sheriff from an attachment for not returning the *renditioni exponas*, on his paying over the balance remaining in his hands, after satisfying the former writs. *Reg. v. Hertfordshire (Sheriff)*, 9 D. P. C. 916.

Fees.

See under "Sheriffs' Fees, &c.," *post*, p. 505; and see also *Rev v. Jones*, ante, p. 119.

CHAPTER VII.

WRIT OF DISTRINGAS NUPER VICE COMITEM.

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Introductory.

THE writ of *distringas nuper vice comitem* is a process against an ex-sheriff to compel him to sell goods which he has returned as remaining in his hands for want of buyers and for bringing the proceeds into Court.

Referring to execution of *distringas* against ex-sheriff, "The seizure of goods under this writ cannot be followed up by their sale. The remedy being one of distress, the goods seized are held only at common law as a pledge. In case the issues taken under this writ are of trifling or insufficient amount, a summons can be taken out to increase them, which is done by an order on an acting sheriff." Edwards on Execution, p. 145. Execution.

Form of Writ.

Form of Distringas against ex-Sheriff (No. 14. App. H. of R. of S. C. 1883).

18— [*Here put letter and number*].

In the High Court of Justice,
Division.

Between A. B. - - - - - Plaintiff

and

C. D. - - - - - Defendant.

VICTORIA, by the grace of God, &c. of Great Britain and Ireland Queen, Defender of the Faith:—

To the Sheriff of , greeting:

We command you that you distrain late sheriff of your county aforesaid, by all his lands and chattels in your bailiwick, so

that neither he nor anyone by him do lay hands on the same until you shall have another command from us in that behalf, and that you answer to us for the issues of the same, so that the said expose for sale and sell or cause to be sold for the best price that can be gotten for the same, those goods and chattels which were of in your bailiwick, to the value of £ (a) the sum of £ which lately before us in our High Court of Justice in a certain action wherein plaintiff and defendant by a (b) of our said Court bearing date the day of was (c) to be paid by the said to the said and of the sum of £ the amount at which the costs in the said (b) mentioned have been taxed and allowed, and of interest on the said sum of £ at the rate of £4 per centum per annum from the day of and on the said sum of £ at the same rate from the day of which goods and chattels he lately took by virtue of our writ, and which remain in his hands for want of buyers, as the said late sheriff hath lately returned to us in our said Court. And have the money arising from such sale before us in our said Court immediately after the execution hereof to be paid to the said

And have there then this writ.

Witness, &c.

This writ was issued by, &c.

The defendant is a and resides at in your bailiwick.

(a) "The amount of" or "part of."

(b) "Judgment" or "order."

(c) "Adjudged" or "ordered."

CHAPTER VIII.

WRITS OF SEQUESTRATION AND FIERI FACIAS DE BONIS
ECCLESIASTICIS.

REFERRING to the writ of sequestration, this writ is a prerogative process (formerly confined to the Court of Chancery, and the Courts of Probate and Divorce) addressed to certain commissioners empowering them to enter upon real estates and sequester the rents, and upon the goods, chattels and personal estate of a person in contempt for disobedience of a decree or order of Court, and to keep the same until the defendant clear his contempt. It has no return, and is granted upon a return of *non est inventus* by the serjeant-at-arms, or by a sheriff on an attachment.

By the Rules of the Supreme Court, 1883, Ord. XLII. r. 6, "A judgment for the recovery of any property other than land or money may be enforced (a) by writ for delivery of the property; (b) by writ of attachment; (c) by writ of sequestration."

How judgment for property other than land or money enforced.

By Ord. XLIII. r. 3, "Where it appears, upon the return of any writ of *fieri facias* or any writ of *elegit*, that the person, against whom such writ was so issued, is a beneficed clerk, and has no goods or chattels, nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or one or more writs of sequestration."

Writs of *fi. fa. de bonis ecclesiasticis* and sequestration.

By r. 4 of the same Order, "Such writs as in the last preceding rule mentioned, when sealed, shall be delivered to the bishop to be executed by him, and such writs, when returned by the bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the Central Office; and for the execution of such

Procedure thereon.

writs the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority."

Issue and
execution of
writs in aid.

And by r. 5 of the same Order, "Writs of *renditioni exponas*, *distringas nuper vice comitem*, *feri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *feri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore."

And see r. 6 of Ord. XLII., and forms Nos. 5, 7, and 13 in App. H. of R. S. C., 1883, as also sect. 52 of the Bankruptcy Act, 1883.

CHAPTER IX.

WRIT OF HABERE FACIAS POSSESSIONEM.

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Introductory.

THIS is a process of execution in an action of ejectment (Wharton, 743), and by Ord. XLII. r. 5 is directed to be used where there is a judgment for the recovery or for the delivery of the possession of land. It has also been substituted for a writ of assistance except for the recovery of chattels, in which case a writ of assistance may still issue. See *Wyman v. Knight*, 39 Ch. D. 165.

Forms of Writ.1. *Writ of Possession* (Form No. 8, App. H., R. S. C. 1883).

18 . No. .

In the High Court of Justice.

Division. .

Between - - - - - Plaintiff,

and

- - - - - and others Defendants.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the sheriff of greeting :

Whereas lately in our High Court of Justice by a judgment of the Division of the same Court recovered [or was

ordered to deliver to] possession of all that [*describing the property recovered as in the judgment*] with the appurtenances in your bailiwick: Therefore, we command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said to have possession of the said land and premises with the appurtenances.* And in what manner you have executed this our writ make appear to us in our said Court immediately after the execution thereof and have you there then this writ.

Witness [*name of Lord Chancellor*], Lord High Chancellor of Great Britain the day of in the year of our Lord .

2. *Writ of Possession and Fi. Fa. for Costs upon a Judgment for Plaintiff in Ejectment where Defendant has appeared.*

(*Title as in preceding Form.*)

VICTORIA [*&c. as supra*]. To the sheriff of greeting:

Whereas [*&c. as in preceding form to the asterisk,* and proceed*]. And we also command you that you omit not by reason of any liberty of your county but that you enter the same and that of the goods and chattels of the said in your bailiwick you cause to be made £ which the said lately in our said Court by a judgment of our said Court dated recovered against the said for the said 's costs of the said action, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of £ as appears by the certificate of the said taxing master dated the day of together with interest upon the said sum at the rate of £4 per centum per annum from the day of in the year of our Lord [*date of taxing master's certificate*] and have that money and interest aforesaid in our said Court immediately after the execution hereof to be paid to the said . And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof: And have you there then this writ. Witness [*&c. as in preceding form*].

Issue of Writ.

The practice relating to the issue of this writ is governed by Ord. XLVII. of the Rules of the Supreme Court (*q. v.*). In cases in which the judgment or order is that *a party do recover possession of any land*, demand and service is not necessary before the issue of the writ, but where by the judgment (under rule 2 of the above Order) some person is directed to deliver up possession of any land to some other person, service, but not demand, is necessary. Annual Practice, 1894, Part III. p. 1207.

The writ should follow the description of the property which is inserted in the judgment or order, and the latter should contain such a description as will clearly indicate the property of which possession is to be delivered. *Thynne v. Sarl*, [1891] 2 Ch. 79.

Writ to follow description of property in judgment.

The writ may be issued even after the plaintiff's title to the reversion has expired. *Knight v. Clarke*, 15 Q. B. D. 294.

Execution of Writ.

It is customary for the plaintiff to indemnify the sheriff in connection with his execution of this writ. Com. Dig. Ex. (a) 3.

Customary for plaintiff to indemnify sheriff.

Bond of Indemnity.

Know all men by these presents that we A. B. of C. D. of and E. F. of in the county of are held and firmly bound to G. H. of high sheriff of the said county in the sum of £ to be paid to the said G. H. or to his certain attorney executors administrators or assigns for which payment to be well and truly made we bind ourselves and each of us our and each of our heirs executors and administrators and every of them jointly and severally firmly by these presents sealed with our seals and dated this, &c.

Whereas on the day of A.D. 18 a writ of *hab. fac. poss.* was delivered to the said G. H. at the suit of the above-named A. B.; and whereas also the above-named A. B. hath applied to and requested the said high sheriff to deliver to him under the said writ certain tenements in his bailiwick that is to say which he hath consented to do upon being indemnified for so doing.

Now the condition of the above written obligation is such that if the above-bounden A. B. C. D. and E. F. or any of them their or any of their heirs executors or administrators do and shall from time to time and at all times hereafter well and sufficiently indemnify the said G. H. from all costs and expenses to be incurred or to which he may become liable by reason of the premises then that the above written obligation to be void otherwise to stand and remain in full force vigour and effect.

Signed sealed and delivered in the)	A. B.
presence of me .)	C. D.
	E. F.

If such indemnity be refused, the sheriff must deliver possession of what is shown to him by the plaintiff or by some one on his behalf; if given, he must deliver what plaintiff requires. *Connor v. West*, 5 Burr. 2673; 6th ed. Atk. 240.

In order to execute an *habere facias possessionem*, the officer may, if necessary, break open either the outer or the inner doors of the house. *Semayne's Case*, 5 Rep. 91 b. If violence be apprehended he should take the *posse comitatus* with him. The sheriff, or his officer, should remove all persons and their goods from off the premises, for if any persons are left thereon the execution is not complete. *Upton v. Wells*, 1 Leon. 145.

Writ. how executed.

The writ should be executed by the sheriff within a reasonable time after receipt. But though the sheriff has a reasonable time for execution, "that does not excuse him in refusing to execute a writ when he has the opportunity, is required to do so, and nothing occurs to prevent him." *Per Denman, C.J.*, in *Mason v. Paynter*, 1 Q. B. 974; 1 G. & D. 381. In that case judgment had been signed for the plaintiff in ejectment. He caused to be issued and delivered to the sheriff an *habere facias possessionem*; then made an appointment with the sheriff for the purpose of executing the writ. The sheriff having been informed, by the defendant's attorney, that the proceedings were irregular, and would be set aside, did not execute the writ. The judgment was afterwards set aside on an affidavit of merits. It was held that the plaintiff was entitled to recover in an action against the sheriff the costs he had incurred in preparing to assist the sheriff to execute the writ.

Writ should be executed within reasonable time.

The sheriff may give possession by delivery of part of the property, and that which he takes as a symbol of possession ought to be part and parcel of the thing itself. If delivery is required of a certain number of acres of land, the sheriff must give possession of so many acres in quantity according to the estimation of the county where the land is situate. *Floyd v. Bethill*, 1 Roll. Rep. 420. If there be several tenements in the possession of one person, the delivery of possession of one tenement in the name of the whole is sufficient (*Floyd v. Bethill*, 1 Roll. Rep. 420); but if the several tenements are in the possession of several tenants, then possession should be given of each separately, for the delivery of one in the name of all is not sufficient.

Possession, how given.

When the plaintiff recovers only an undivided portion of the property, the duty of the sheriff is not to turn out the persons in possession, but only to put the plaintiff in possession of the particular portion to which he is entitled. *Doe d. Hellyer v. King*, 6 Ex. 793, *per Parke, B.*; *Doe d. Saul v. Dawson*, 3 Wils. 49.

If the sheriff gives possession of any land not included in the writ, the Court will, it seems, order it to be restored. *Connor v. West*, 5 Burr. 2673; *Roe d. Saul v. Dawson*, 3 Wils. 49.

Disturbance. As to disturbance, see *Doe d. Lloyd v. Roe*, 2 Dowl. N. S. 407; *Doe d. Pitcher v. Roe*, 9 D. P. C. 971; *Kingsdale v. Mann*, 6 Mod. 27; and *Doe d. Thompson v. Mirchouse*, 2 D. P. C. 200.

Execution ;
when com-
plete. The execution is not complete until the bailiffs are withdrawn and possession completely given (*Anon.*, 6 Mod. 115; 6th ed. Atk. 242), and the writ is not completely executed until all persons and goods on the premises have been removed.

Subject as above this writ is executed very similarly to an *elegit*.

And see under title "Writ of Restitution."

Return of Writ.

Return, un-
less required.
not cus-
tomary. Unless required to do so, it is not customary for the sheriff to make a return to this writ; but it seems that strictly the sheriff should make a return as under an *elegit*.

FORMS OF RETURN.

1. *Return to a Writ of Possession that no Person came to point out the Premises.*

I certify to Our Lady the Queen that this writ was delivered to me on _____ since which time I have always been ready and willing to execute the same as within I am commanded; but neither the within-named _____ nor any person on his behalf ever came to show me the land [*or* "premises"] within mentioned or any part thereof, or to receive possession of the same, or any part thereof, from me.

The answer of _____, Esquire, sheriff.

2. *Return to Writ of Possession that Sheriff has delivered Possession.*

By virtue of this writ to me directed I did on _____ deliver to the within-named _____ possession of the within-mentioned land [*or* "premises"] with the appurtenances, as within I am commanded.

Esquire, sheriff.

3. *Return to Writ of Possession and Fi. Fa. for Costs of Execution of Writ.*

By virtue of this writ to me directed I did on _____ deliver to the within-named _____ possession of the within-mentioned land [*or* "premises"] with the appurtenances, as within I am commanded: I further certify and return that the within-named _____ hath not any goods or chattels in my bailiwick whereof I can cause to be made the costs and interest within mentioned, or any part thereof,

as within I am commanded [or "that I have caused to be made of the goods and chattels of the within-named the costs and interest within mentioned, which I have ready at the time and place within mentioned to be rendered to the said as within I am commanded].

Esquire, sheriff.

In view of the sheriff's duty to, if necessary, raise the *posse comitatus*, a return of inability to deliver possession because of resistance is a bad return. Dalt. Sh., 256.

Fees.

The sheriff is entitled to an undertaking from the plaintiff for his (sheriff's) fees and expenses in connection with a writ of possession; and as to such fees, see under "Sheriffs' Fees, &c.," *post*, p. 505.

Incidental.

In the event of non-execution, or only partial execution, of a writ of possession, an *alias habere* may be sued out on the return of such writ. *Devereux v. Underhill*, 2 Keb. 245; *Molineux v. Fulgam*, Palm. 289. See also *Lessee of Massey v. Ejector*, 1 Jones, Ex. Ir. 457; and *Lessee of Linchan v. Anthony*, Batty, K. B. Ir. 453. But, if possession be once completely given under this writ, another writ of possession cannot be issued by the plaintiff notwithstanding his being disturbed in such possession by the same defendant and that the sheriff has not yet returned the prior writ. *Doe d. Pate v. Roe*, 1 Taunt. 55.

As to the jurisdiction of the Court to order the delivery up of a chattel not connected with land, see *The Duke of Somerset v. Cookson*, 3 P. Wms. 389; *Pusey v. Pusey*, 1 Vern. 273; *Fells v. Read*, 3 Ves. 70; 3 R. R. 47; and as to the issue of a writ of assistance to recover a specific chattel, *Cazet de la Borde v. Othon*, 23 W. R. 110; and *Wymen v. Knight*, 39 Ch. D. 165, where such a writ was directed to be issued as recently as July, 1888.

CHAPTER X.

WRIT OF DELIVERY.

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Introductory.

Writ issued
for recovery
of property
other than
land or
money.

THE Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 2, provides for the recovery of specific goods, and Ord. XLIII. r. 6 of the Rules of the Supreme Court directs that a judgment for the recovery of any property, other than land or money, shall be enforced by (*inter alia*) a writ for the delivery of the property. Ord. XLVIII. rr. 1 and 2, *ante*, p. 30, regulate the issuing of the writ.

As to assess-
ment of value,
&c. before
issue of writ.

It was held by Field, J., in *Corbett v. Lewin*, W. N. (1884), 62, that where an interlocutory judgment had been signed under Ord. XIII. r. 5, the writ could not be issued until after the value has been assessed and final judgment signed for the recovery of the chattel or its value; but in *Winfield v. Boothroyd*, 34 W. R. 501, it was held that, in an action of detinue, an assessment by agreement was sufficient, and the words "assessed value, if any," inserted in Rule 1 of Ord. XLVIII. appear to make assessment unnecessary in all cases, and also distinguish this rule from sect. 75 of the Common Law Procedure Act, 1854, under which *Chilton v. Carrington*, 15 C. B. 730, relied on by Field, J., in his judgment in *Corbett v. Lewin*, was decided.

It is in the power of the plaintiff to apply either for a writ of delivery leaving it in the option of the defendant to return the chattel or pay the value, or for a writ of delivery absolute whereby the sheriff is directed to distrain upon the lands and chattels of the defendant until he render to the plaintiff the chattel named in the judgment.

Cases may also arise in which this writ and the others mentioned in Ord. XLII. r. 6 may be found to be ineffectual, and the old writ of assistance may be required; as to which see *Wyman v. Knight*, 39 Ch. D. 165.

Forms of Writ.

1. *Writ of Delivery* (Form No. 10 in App. II. to R. of S. C. 1883).

18 [*Here put the letter and number.*]

In the High Court of Justice.

Division.

Between A. B. - - - - - Plaintiff

and

C. D. - - - - - Defendant.

Victoria by the Grace of God, &c. of Great Britain and Ireland
Queen, Defender of the Faith.

To the sheriff of greeting.

We command you that without delay you cause the following chattels, that is to say, [*here enumerate the chattels recovered by the judgment or order for the return of which execution has been ordered to issue*] to be returned to A. B., which the said A. B. lately in our High Court of Justice recovered against C. D. [*or C. D. was ordered to deliver to the said A. B.*] in an action in the Division of our said Court.* And we further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said C. D. by all his lands and chattels in your bailiwick so that neither the said C. D. nor any one for him do lay hands on the same until the said C. D. render to the said A. B. the said chattels.†

And in what manner, &c.

And have you there then this writ.

Witness, &c.

2. *The like, but instead of a distress until the chattel is returned, commanding the sheriff to levy on defendant's goods the assessed value of it* (Form No. 11 in App. H. to R. of S. C. 1883).

[*Proceed as in the preceding form until the,* and then thus*] And we further command you that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C. D. in your bailiwick you cause to £ [*the assessed value of the chattels*].† And in what manner, &c.

And have you there then this writ.

Witness, &c.

[If in either of the preceding forms it is wished to include damages, costs, and interest, proceed to the † and continue thus]

And we further command you that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the sum of £ [damages] And also interest thereon at the rate of £4 per centum

per annum from the day of which said sum of money and interest were in the said action by the judgment therein [or by order dated the day of] adjudged [or ordered] to be paid by the said C. D. to A. B. together with certain costs in the said judgment [or order] mentioned and which costs have been taxed and allowed by one of the taxing officers of our said Court at the sum of £ as appears by the certificate of the said taxing officer dated the day of And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ [costs] together with interest thereon at the rate of £4 per centum per annum from the day of and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said A. B. in pursuance of the said judgment [or order].

And in what manner &c.

And have you there this writ.

Witness &c.

Execution of Writ.

How executed.

This writ is delivered to the sheriff for execution and is executed in the same manner as a writ of *feri facias*, and the sheriff may be compelled to return it in the same way. Therefore, adapt the various forms accordingly. The following is, however, a form of return in the case of *nulla bona* and where the defendant is a beneficed clerk, and on which return execution against ecclesiastical goods is founded.

Return of
nulla bona
where defen-
dant is a
beneficed
clerk.

Return of Nulla Bona.

“The within named C. D. has no goods or chattels, nor any lay fee in my bailiwick, which I can seize or take, or pay, or deliver to the within-named A. B. or whereof I can cause to be made the moneys [or £] and interest within mentioned, or any part thereof as I am within commanded: but I do hereby certify that the said C. D. is a beneficed clerk, to wit, rector of the rectory [or vicar of the vicarage, or as the case may be] and parish church of in my county, which said rectory [or vicarage] and parish church are within the diocese of the Right Reverend Father in God by Divine permission Lord Bishop of [or within the peculiar jurisdiction of the Very Reverend the Dean and Chapter of the Cathedral Church of St. of and instituted to try them as ordinary, as the case may be].”

Fees.

See under “Sheriffs’ Fees, &c.,” *post*, p. 505.

CHAPTER XI.

WRIT OF EXTENT.

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Introductory.

THE writ of extent is a writ of execution against the lands and goods of the Crown-debtor. It is the peculiar remedy of the sovereign in order to compel the payment of all debts of record due to the Crown. It is called an extent from the words of the writ *extendi facias*, and by it the sheriff is directed to cause the lands, goods and chattels of the debtor to be appraised at their full or extended value before being delivered to satisfy the debt. No allusion is made to an extent in the earlier Orders under the Judicature Acts, and by Ord. LXII. nothing therein was to affect the practice or procedure on the Revenue side

Writ of extent in chief.

of the Exchequer Division. Now, however, by Ord. LXVIII. r. 2, this procedure is assimilated to the procedure in an ordinary action.

According to Stephen's Commentaries, 11th ed., Vol. III., at p. 686, "A debt of record, as regards the Crown, is subject in general to the same definition as in the case where the party to whom it is due is a subject; but there are several instances in which a debt is so ranked in favour of the Crown, by way of exception from the general rule, and by force of its special prerogative." It was enacted by 33 Hen. 8, c. 39, that all obligations made to the Crown should be "of the same nature, force and effect to all intents and purposes" as a statute staple, whilst by 13 Eliz. c. 4, all the lands of every accountant of the Crown (except accountants under £300 per annum) are declared liable to payment of all debts upon their accounts from them to the Crown, and "in like and in as large and beneficial manner to all intents and purposes" as if they had on the day they first became such accountants stood bound by writing obligatory having the effect of a statute staple.

Inquisition
to be held.

By the writ of extent a sheriff is, it will be observed, directed to hold an inquisition on the oaths of good and lawful men in his bailiwick for the purpose of inquiring as to and appraising the value of the lands, goods and debts of the Crown-debtor, and to take and seize the same into the hands of the sovereign. In order to afford the debtor an opportunity of showing that the writ should not issue, the extent should, it seems, generally be preceded by a *scire facias* (a), although if the debt is in danger of being lost an immediate extent may, it seems, be issued on affidavit of circumstances. As to the issue of an immediate extent, see 28 & 29 Vict. c. 104.

Extent
generally pre-
ceded by a
scire facias.

Writ of ex-
tent in aid.

An extent in aid is issued at the suit of the Crown-debtor against a person indebted to such Crown-debtor. By 57 Geo. 3, c. 117, after reciting that "extents in aid have in many cases been issued for the levying and recovering of larger sums of money than were due to his Majesty by the debtors on whose behalf such extents were issued, and it is expedient to prevent such practice in future, and in other cases extents in aid have been issued at the instance and for the benefit of persons indebted to his Majesty by simple contract only," it was enacted

(a) As to reference in this branch to *scire facias*, see under title "*Writ of Scire Facias*," *post*, p. 224.

that the amount of debt due to the Crown should be stated in the fiat for the extent in aid and that such amount or the amount due to the Crown-debtor, if less, should be endorsed upon the writ as the sum to be levied by the sheriff—with the therein mentioned provision for any surplus on any sale under such writ—and further that the therein mentioned Crown-debtors should be precluded from issuing this writ in certain cases. It seems the practice has been not to issue a fiat for an extent in aid except on affidavit that the debt is otherwise in danger of being lost to the Crown.

There is, in addition, an extent in chief in the second degree. This is a proceeding instituted by the Crown at its own instance against the debtor of the Crown-debtor, and to this last mentioned writ 57 Geo. 3, c. 117, does not, it seems, apply.

Writ of extent in chief in the second degree.

“Under the extent in chief in the second degree the sheriff is to take the body, goods, lands, debts, credits, specialties, and sums of money of the defendant, in the same manner as under an extent against the Crown’s first debtor; the goods, debts, &c. of the debtor of the Crown-debtor being bound in the same manner as the goods, debts, &c. of the Crown-debtor on the first extent; and all the observations made in this particular with respect to the first extent in chief, will apply to the extent in the second degree. But with respect to the lands of the Crown-debtor’s debtor, which the sheriff is directed to seize under the extent in chief in the second degree, they of course are bound merely from the recording of the debt from the Crown-debtor’s debtor to the Crown-debtor under the inquisition; unless, indeed, the debt due to the Crown-debtor be by judgment or recognizance; in which cases, the Crown, of course, takes the lien of the plaintiff in the judgment, or conusee in the recognizance, on the land of the defendant or the conusor, which they had at the time of the judgment entered, or recognizance acknowledged.” West on Extent, p. 247.

What may be taken under extent in chief in second degree.

In the event of the death of the Crown-debtor a special writ of extent is issued. It recites the death of the debtor and is, therefore, called a writ of *diem clausit extremum*. It is issued on an affidavit of the debt and death (28 & 29 Vict. c. 104, s. 47), and by it the sheriff is directed to take and seize the chattels, lands, and debts of the deceased Crown-debtor into the hands of the Crown. In other words “the writ of *diem clausit extremum* . . . is a writ directing the sheriff to inquire, by means of a jury, when and where the Crown-debtor died, and what goods and

Writ of *diem clausit extremum*.

chattels, debts, credits, specialties, and sums of money, and what lands the said debtor had at the time of his death, &c., and to take and seize the same into the king's hands." West, 319. And see as to procedure for issue of a writ of *diem clausit extremum* 28 & 29 Vict. c. 104, s. 47.

Form of Writ.

Writ of Extent in Chief.

Victoria, &c. to the sheriff of greeting.
Whereas A. B. and C. D. of by their writing obligatory
sealed with their seals bearing date the day of A.D. 18 of
became jointly and severally bound to Us in the sum of £ of
good and lawful money of Great Britain payable at a day now past
which said sum of money they have not nor hath either of them yet
paid or caused to be paid to Us as We are informed; and We being
willing to be satisfied the same with all the speed We can as is just
do command you that you omit not by reason of any liberty in your
bailiwick but enter the same and take the said A. B. and C. D. by
their bodies wherever they shall be found in your bailiwick and
keep them safely and securely in prison till We shall be fully satisfied
the said debt; and that as well by the oaths of good and lawful
men of your bailiwick as by the oath and testimony of any other
good and lawful men by whom the truth may be the better known
as by all other lawful means you diligently enquire what lands and
tenements and of what yearly values the said A. B. and C. D. or
either of them had in your bailiwick on the said day of
A.D. 18 on which day they first became Our debtors as aforesaid or
at any time since; and what goods and chattels and of what sorts
and prices and what debts credits and specialties and sums of money
the said A. B. and C. D. or either of them or any person or persons
to their or either of their use or in trust for them or either of them
now hath or have in your bailiwick: and that all and singular such
goods and chattels lands and tenements debts credits specialties and
sums of money in whose hands soever the same now are you dili-
gently appraise and extend on the oaths of the said good and lawful
men, and do take and seize the same into Our hands there to remain
until We shall be fully satisfied the said debt according to the form
of the statute made for the recovery of such Our debts: and lest
this Our command should not be fully executed We further com-
mand and empower you by these presents to summon before you
such persons as you shall think proper and carefully examine them
in the premises and that you distinctly and openly make appear to
the justices of the Queen's Bench Division of the High Court of
Justice on the day of next in what manner you shall
have executed this Our command and that you then have there this
writ: Provided that what goods and chattels you shall seize into
Our hands by virtue hereof you do not sell or cause to be sold until
We shall otherwise command you. Witness, &c.

Execution of Writ.

Form of Warrant.

County of } sheriff of the county aforesaid, to the
to wit . } keeper of the gaol of the said county, and also to
and my bailiffs, greeting: By virtue of her Majesty's
writ of extent to me directed, I command you and every of you,
jointly and severally, that you omit not, &c. but take if he
shall be found in my bailiwick, and him safely keep, so that I may
have his body before the justices of the Queen's Bench Division of
her Majesty's High Court of Justice on the day of and
also, that you seize and take all and singular the goods and chattels,
lands and tenements, debts, credits, specialties, and sums of money
which the said or any other person or persons in trust for
him, or to his use, have or had on the day of in the
year of the reign of her present Majesty; so that I may
cause the same to be diligently appraised and extended, and to be
taken and seized into her Majesty's hands, that she may retain the
same until she be fully satisfied a debt or sum of £ according to
the form of the statute made for recovering her Majesty's debts of
that nature, but that you do not sell or dispose of the said goods
and chattels, lands and tenements, until you have other commands
from me herein.

Hereof fail not, as you will answer at your peril. Given under
the seal of my office this day of in the year of Our Lord
one thousand eight hundred and .

With respect to the body of the defendant, it cannot be bailed. *As to body of*
West, 73. The *capias* clause of the writ of extent is not usually *defendant.*
enforced. *Rev v. Plaw*, 3 Price, 94.

The sheriff may, if the doors be not open, break the party's *As to break-*
house to arrest him, but before he breaks it, he should signify *ing house.*
the cause of his coming and make request to open the door.
West, 73.

Where the seized property of a Crown-debtor was ample to *As to dis-*
cover the demand, he was ordered to be discharged. *Rev v.* *charge,*
Kinnear, 3 Price, 536. A party in custody under a writ of *and escape of*
extent at the suit of the Crown, allowed voluntarily to escape, *defendant.*
but retaken and restored into the same custody and under the
same writ, is rightly in custody, and is not entitled to his dis-
charge. *Reg. v. Renton*, 2 Exch. 216; 17 L. J. Ex. 204.

Crown debts are not subject to the provisions of the Debtors *Crown debts*
Act. *In re Smith*, 2 Exch. D. 47; 46 L. J. Q. B. 73. *not subject to*
Debtors Act.

For fuller particulars as to mode of arrest, &c., see under title
"Arrest," *post*, p. 154.

Inquisition.

Evidence.

With regard to the inquisition, "a summons should be issued by the sheriff to the defendant, and to all other persons who can give any evidence as to the defendant's property, to attend before the inquisition; if either the defendant or the witnesses summoned do not attend, or refuse to answer any questions put to them (excepting only questions, the answers to which would subject them to punishment), the Court will grant an attachment against them." 2nd ed. Watson on Sheriff Law, 370.

Jurors.

The remarks as to the qualification, liability, exemption, summoning, and payment, &c. of jurors on an inquiry under a writ of inquiry are *mutatis mutandis* applicable to jurors on an inquisition, or appraisement, under a writ of extent. See, therefore, under title "Assessment of Damages, &c.," *post*, p. 408.

Juror's Oath.

You shall well and truly inquire what lands and tenements and of what yearly value A. B. has and what goods and chattels and of what sorts and values and of what debts credits specialties and sums of money the said A. B. or any person or persons to his use or in trust for him now have and that you appraise such goods and chattels so that I may extend seize and take the same into her Majesty's hands until she shall be fully satisfied the sum of £ due to her upon an extent directed to me . So help you God.

Claimant may cross-examine prosecutor's witnesses.

The inquisition to find debts, &c. on an extent is not altogether an *ex parte* proceeding; and a claimant of property in the goods inquired of may assert his claim before the sheriff and cross-examine the prosecutor's witnesses on material points with the object of showing the goods to be his (claimant's) property; and if the sheriff will not allow such interrogatories to be put, the Court will set aside the extent and inquisition. *Rex v. Bickley*, 3 Price, 454; and *Rex v. Collingridge*, 3 Price, 280.

Finding of jury.

In an immediate extent on an inquisition to find debts, the jury may find the fact of a debt being due to the Crown on the sole evidence of an affidavit that the debt is due. *Reg. v. Ryle*, 9 M. & W. 227; 6 Jur. 238.

The jury's findings of facts, especially descriptive of lands, should be full and precise. *Rex v. Bickley*, *supra*; and *Rex v. Sherwood*, 3 Price, 269; and see *Rex v. Rawlings*, *Ex parte Wilkinson*, 12 Price, 834.

Manner of stating the interest of

"With respect to the manner of stating the interest of the debtor in the inquisition, where trust estates are seized, it would

be correct, and, indeed, the duty of the sheriff and jury, to state the interest of the debtor in the inquisition as it is proved before them. If, however, the sheriff should not be able to obtain any other evidence of the debtor's interest than his possession, and the jury should consequently return that he is seized in fee, this would give the Crown the whole interest to which the debtor is entitled. For as any person who traverses the inquisition must not only traverse the Crown's title, (that is, in this case, the title of the Crown-debtor,) but must also show title in himself, all that he does not take from the Crown by proving title in himself will remain in the Crown, though the Crown's title should not be, precisely, as found by the inquisition." West, 135; and see as to latter statement *Rex v. Soulby*, 1 Y. & J. 249. debtor in the inquisition.

In an inquisition on an extent in aid, it is sufficient that the prosecutor of the extent is found to be indebted to the Crown (generally) at the time of taking the inquisition, without stating the amount of the debt or the time and manner of its accruing due. *Rex v. Franklin*, 5 Price, 614.

An inquisition finding special matter, without stating any conclusion as a fact, is bad and may be quashed on motion. *Rex v. Sherwood*, 3 Price, 269.

And see under "Order of Extents," *post*, p. 143.

The inquisition may, it seems, be adjourned or another inquisition may be held before the writ is returned in order to find property not found by the first. In this case a return is made to the Court of both inquisitions. Adjournment of inquisition.

Mode and Extent of Seizure.

"With respect to the lands, the seizure is merely nominal; and the sheriff does nothing but find them through the medium of the jury; which finding is, in effect, the seizure." West, 74. Finding of lands.

"The sheriff under an extent may either extend or appraise a term for years; but it is not bound, in the hands of a *bonâ fide* purchaser, by the bond or other record to the Crown; but merely, like other chattels, from the award of execution." *Ib.* 136. Term of years.

With regard to the propriety of the sheriff seizing the lands, if the goods, &c. be sufficient, West, after referring to the judicial As to the amount of debtor's goods

and lands to
be seized.

arguments *pro* and *con.* says: "But notwithstanding these arguments, it appears clear from the form of the present writ of extent, and of the return which is always made to it, that the sheriff may seize the lands, though the goods should be sufficient to satisfy the debt. Yet if the goods are fully sufficient, it cannot be apprehended that he would run any risk by omitting to seize the lands." It will be, however, observed (*infra*) that the Court will not make an order for the sale of the debtor's lands, if goods sufficient to pay the debt have been seized under the extent. "It would appear (and such, indeed, is generally understood to be the law) that it is strictly the duty of the sheriff to seize *all* the defendant's goods, though to ten times the amount of the debt; and all his debts, &c. and lands, though the goods may be ten times more than sufficient to satisfy the debt. But though such is the direction contained in the writ, and though such, strictly speaking, is the duty of the sheriff, it seems to me that the sheriff would run no risk in seizing less than the whole, provided he seized fully sufficient to satisfy the debt. . . . And [for the therein mentioned reasons] it can never be the sheriff's interest to seize goods to a larger amount than will be fully sufficient to cover the debt, nor to seize the debtor's lands or other estate if the goods be sufficient." West, 75.

"If no other person than the defendant has any property in the goods, either general or special, at the date of the *teste* of the extent, the sheriff should seize them." *Ib.* 114.

When sheriff
may break
debtor's
house.

If the doors be not open, the sheriff may also break the party's house to take the goods, but as in the case of arrest he ought, before he breaks it, to signify the cause of his coming, and make request to open the doors.

Restoration
of property.

Where the debtor's property is ordered to be restored to him on his giving approved security, the sheriff is responsible for restoring it before the approval of such security. *Rex v. Kinnear*, 3 Price, 536. It will also be observed that the sheriff must not sell any goods seized by him under the extent until so ordered, as to which see *post*, p. 152, under sub-title "Sale."

Sheriff not to
sell until
ordered.

Sheriff has no
power to
collect debts
due to Crown
debtor, but
only to seize.

"The sheriff has no power on an extent against the Crown-debtor to collect or levy the debts due to the Crown-debtor; he is merely to seize them, which seizure is a seizure in law. The sheriff has, indeed, no power of compelling payment . . . the only means of compelling payment is by suing out a *scire facias*, or an immediate extent, against the debtors of the Crown-debtor,

after the return of the inquisition. And if a debtor of the Crown-debtor were to pay his debt to the sheriff, and the extent against the Crown-debtor were set aside by plea or otherwise, his payment to the sheriff would be no answer to an action by his creditor. And it may be doubted, if the sheriff were to neglect to pay the money over to the Crown, how far such payment to the sheriff would be deemed a payment to the Crown." West, 171.

"Specialties used formerly to be annexed to the inquisition, Specialties. and returned with it, but the sheriff now usually keeps them till called upon to deliver them to the solicitor for the Crown." *Ib.* 74.

Order of Extents.

"Extents in chief take place *inter se* according to their *teste*. An extent in chief finding the same goods found upon a former extent in aid shall be preferred and paid before it. If an extent in aid issue and goods be found and seized, and upon a *reuditioni exponas* the sheriff return that he has the money, and an extent in chief then comes, which also finds the goods first extended, the king shall have the money (*i.e.* on the extent in chief) but not if the money had been delivered over. If goods are found on an extent in aid, and then an extent in chief comes, on which goods are found, but not the same that were found on the extent in aid, as to which no evidence is offered, nor is it insisted that they should be found, and then another extent in chief comes, and the party prosecuting it offers to find what was seized in aid, and is refused, the Court will order a new extent of the like *teste* as the second extent in chief, and refuse it to the first extent in chief. Where the same goods as are found under one extent are also seized under a second, it should be mentioned in the second inquisition that these goods are subject to the first extent. And where the two extents are executed at the same time, as the sheriff may have some doubt about their priority, it would seem to be the safest way to mention in the inquisition under each extent that the goods are seized under the other extent." West, pp. 117 and 118, and see as to priority of extents in chief over extents in aid, *Ree v. Larking*, 8 Price, 683.

What may be taken (comprising Crown's Lien).

Legal and trust estates, &c.

"As to the nature of the interest which may be taken under the Crown's execution against land, the Crown may [as already indicated] take not only the legal estate of its debtor, but also trust estates, as also lands conveyed with power of revocation and lands purchased in trust for Crown-debtor." West, pp. 129, 130, and 133. A term of years may be also taken and "may be either appraised as a chattel or extended as land under the extent." *Ib.* 117. Moreover, an equity of redemption may be taken under an extent (*Rex v. Delamotte*, For. 162), as also other equitable interests and rents and impropriate tithes. See Prideaux's *Precedents in Conveyancing*, 15th ed., Vol. I., p. 147.

Term of years.

Equity of redemption and other equitable interests.

Where extent against several.

"If the extent be against several, it always directs the sheriff to inquire what lands and tenements the said A., B., and C., &c. have, or *any or either of them* have or hath, and to seize the same, &c. by which it appears that the lands of each or any of the defendants are liable to be seized." West, 136.

Exception as to necessities for Crown-debtor and family and *averia caruæ*.

"Under an extent all the goods and chattels of the Crown-debtor may be taken, except things necessary *pro victu* of himself and his family; except also *averia caruæ*, if there be other chattels sufficient." *Ib.* 96.

Whatever seizable under *fi. fa.* is seizable under extent, but not *vice versa*.

"With respect to the goods of the defendant, it may be observed, as a general rule for the direction of the sheriff, that whatever may be taken under a *fi. fa.* may also be taken under an extent; but the converse of this proposition of course does not hold, as the extent has all the properties of the *fi. fa.* and many others, even as to goods, which the *fi. fa.* has not." *Ib.* 73. Again, "the general rule of law, with respect to what goods and chattels may be taken under an extent, is this: that all goods and chattels, the absolute property of which remains in the debtor (*i.e.*, where there is no special property in a third person) at the date of the teste of the extent, may be taken under the extent." *Ib.* 97. And by the extent the sheriff is directed also to seize all goods, &c. that any person may have in trust for, or to the use of the defendant. *Ib.* 116.

Goods in trust.

Goods subject to duties of excise, &c.

Moreover, by 4 Vict. c. 20, s. 24, all goods subject to duties of excise, and all materials, machinery, vessels, and implements used in the manufacture, are liable for all duties, arrears, and penalties incurred whilst in the trader's possession, subject to such liability ceasing where goods duly charged with

duty have been sold and delivered in the fair and ordinary course of trade.

The Crown's lien for malt duties is, moreover, superior to that of a factor, and goods which have become chargeable to the Crown for duties cannot be discharged, except by an actual *bona fide* sale. *Att.-Gen. v. Trueman*, 13 L. J. Ex. 70; 11 M. & W. 694; and see *Att.-Gen. v. Walmsley*, 13 L. J. Ex. 66; 12 M. & W. 179. The lien is, however, divisible and confined to the several specific matters in respect of which the various several sums of the duties have accrued, and the whole is not liable generally to the satisfaction of the duties arising on each several part. *Rex v. Dale*, 13 Price, 739.

Crown's lien
for duties.

"The sheriff is also to seize money, the property of the defendant." West, 172. As to an extent against a banker for the recovery of Crown moneys, see *Reg. v. Adams and Warren*, 2 Ex. 299; *Rex v. Ward*, 2 Ex. 301. The sheriff is directed to also inquire as to and seize the Crown debtor's debts, credits and specialties. Debts due to the Crown debtor may be seized under the extent, though they are due only on simple contract. See West, 162. He may, moreover, seize bonds before they are due, though a *seire facias* or extent cannot issue on them till they become due. *Ib.*, 172. Under an extent against several, the debts due to any one may be seized. *Ib.*, 169. So under an extent against one, the debts due to that one and another or others may be seized. *Ib.*, 170. It would seem that on an extent in chief the Crown may seize debts to its debtor, *ad infinitum*; but that on an extent in aid debts cannot be seized beyond the third degree, counting the Crown debtor as one of the degrees. *Ib.*, 303; although see *Rex v. Lushington*, 1 Price, 94.

Money.

Debts, credits
and special-
ties.

As to an extent against one partner, by the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23, after the commencement of that Act (1st January, 1891) a writ of execution shall not issue against any partnership property except on a judgment against the firm, although provision is thereby made for a judgment creditor of a partner having an order charging such partnership interest in the partnership property, &c.

Extent
against a
partner.

As to what may be taken under an extent in chief in the second degree, see *ante*, p. 137, under "Introductory." As to what may be taken under an extent in aid, "the same property as may be taken under the extent in the second degree may be taken under the extent in aid. The body, too, may be taken under an extent in aid." West, 292. And as to what is

What may be
taken under
extents in
chief in
second degree
and in aid.

seizable under an extent in aid, see *Rex v. Lambton*, 5 Price, 428 ; and with regard to debts seizable thereunder, see *ante*.

What may not be taken (or only taken subject to Superior Claims, &c.).

Copyholds. Copyholds are not extendible by Crown process. The execution of a power cannot defeat Crown debts (see *Reg. v. Ellis*, 19 L. J. Ex. 77), but an equitable mortgage effected by deposit of title deeds by a Crown debtor binds the Crown. See *Casberd v. Att.-Gen.*, 6 Price, 411.

Equitable mortgage. “It is conceded, that the Crown cannot avoid an equitable mortgage (*Casberd v. Att.-Gen.*, 6 Price, 411) ; or the lien of a factor (*Rex v. Lee*, 6 Price, 369) ; or of a wharfinger (*Rex v. Humphrey*, 1 McCle. & Yo. 173) ; or a *bonâ fide* assignment in trust for creditors (*Rex v. Watson*, West, 115) ; or any other similar assignment or charge ; because they are created when the debtor has legal power and authority to create them, and attach upon the goods before the process of the Crown, and the Crown can only take the goods subject to such liabilities as the debtor has legally created.” *Per* Patterson, J., in *Giles v. Grover*, 9 Bing. 139.

Lien of factor or wharfinger or bonâ fide assignment in trust for creditors. “So again, in the case of goods pawned or pledged before the *teste* of the extent (*Rex v. Cotton*, Par. 112) ; and in the case of *Rex v. Humphrey*, 1 McCle. 19, the same law prevails.” *Per* Alderson, J., *Ib.* 161. “Goods demised or lent to another for a term certain cannot be taken during the term. But goods fraudulently conveyed away to defeat the execution may be taken as well under an extent as under a *fi. fa.*, and that whether the Crown is taken to be within the protection to creditors afforded by the statute 13 Eliz. c. 5 or not.” West, 115.

Goods pawned or pledged. With regard to the exoneration of lands, see sects. 9 and 10 as qualified by sect. 11 of 2 & 3 Vict. c. 11 with due regard to the partial repeal of sects. 10 and 11 by the Statute Law Revision Act (No. 2), 1890 (53 & 54 Vict. c. 51) ; see also 18 & 19 Vict. c. 15 ; 22 & 23 Vict. c. 35, s. 22 ; and 23 & 24 Vict. c. 115.

But goods fraudulently conveyed away may be taken.

Exoneration of lands.

Crown's Priority.

The Crown debtor's lands are in general bound from the time when the debt became a debt of record, which, as to the bonds referred to in 33 Hen. 8, c. 39, appears to be from the time of the execution of such bonds. And, as already intimated, by 13 Eliz., c. 4, the lands of the therein mentioned accountants of the Crown are declared liable for their debts to the Crown in the same manner as if they had on the day they first became such accountants stood bound in writing obligatory having the effect of a statute staple. The Crown debtor's goods are, it seems, bound from the *teste* of the extent though sold in market overt. It appears, however, that the Crown debtor's debts are bound only from the caption of the inquisition under which they are found. By 33 Hen. 8, c. 39, s. 51, provision is made for Crown suits having preference to private suits, provided the Crown suit be commenced, or process be awarded for the Crown debt at the suit of the Crown, before judgment given for such private persons. But by sect. 48 of the Crown Suits, &c., Act, 1865 (28 & 29 Vict. c. 104), any judgment, decree or order, any recognizance, any inquisition of debt, or any obligation or specialty in the Crown's favour, or any acceptance of office under the Crown, after the commencement of such Act (1st November, 1865), shall not affect any land as to a *bonâ fide* purchaser for valuable consideration or a mortgagee (whether they have or have not notice of such judgment, &c.), unless a writ of extent, or other process of execution in relation to such judgment, &c., has been issued and registered before the execution of the conveyance or mortgage in question and the payment of the purchase or mortgage money (*b*).

When lands,
goods and
debts become
bound.

"The goods and chattels of the Crown debtor are, as before stated, bound from the *fiat* or *teste* of the extent; but it may be a question, whether money like goods and chattels is bound from the *teste* of the extent, and can be followed in the hands of creditors, to whom it has been paid *bonâ fide* after the *teste* of the extent. The inconvenience of holding that money is bound

When money
becomes
bound.

(*b*) 28 & 29 Vict. c. 104, s. 48 relates to Crown debts dated subsequently to the 5th July, 1865. For provisions for registration of Crown debts, &c. as to purchasers and others in relation to Crown judgments, &c. obtained prior to the 5th July 1865, see 2 & 3 Vict. c. 11, ss. 9, 10, and 11, subject to partial repeal of sects. 10 and 11 by the Statute Law Revision Act (No. 2), 1890, and see 22 & 23 Vict. c. 35, s. 22.

by the *teste* of the extent, so as to rip up all payments *bonâ fide* made by the Crown debtor between the *teste* of the extent and the caption of the inquisition, would be so considerable . . . as to induce a conjecture, there being no authority on the subject, that the Court would probably hold that payments made *bonâ fide* by the Crown debtor before the caption of the inquisition are good payments, and that the money could not be recovered back from the creditors, to whom it was so paid." West, pp. 172, 173.

Inception and completion of execution.

"Seizure under an *extendi facias* is the inception of the execution, delivery under a *liberate* is the completion, and so is sale under a *fi. fa.*" *Per* Patterson, J., in *Giles v. Grover*, 9 Bing. 151.

Crown's priority applies to extent in aid.

The doctrine of the Crown process having priority where it bears *teste* on a day subsequent to a subject's execution on a *fi. fa.* under which the sheriff has seized applies to cases of extent in aid. *Rex v. Sloper*, 6 Price, 114; and see *Butler v. Butler*, 1 East, 338; *S. P. Att.-Gen. v. Aldersey*, 1 East, 341; as also *Rex v. Osbourne*, 6 Price, 94; and *Stracey v. Hulse*, 2 Doug. 411. See also *Swain v. Morland*, 3 Moore, 740; and *Giles v. Grover*, 9 Bing. 128.

Commensurate only with interest of debtor,

Although the title of the Crown attaches from the *teste* of the writ, it is commensurate only with the interest of its debtor, and therefore, where that was determined by the act of seizure under a claim of forfeiture in a lease, the title of the Crown was defeated by the same event.

cannot be defeated by distress for rent.

Rex v. Topping, McCle. & Yo. 544. The Crown's priority cannot be even defeated by a distress for rent (even though the goods have been actually distrained and appraised before the *teste* of the writ), for the goods are still liable to seizure for the Crown debt so long as they have not been actually sold. Moreover, the statutory provision 8 Anne, c. 14, s. 1, for payment of one year's rent to the landlord before removal of the goods under an execution does not affect the Crown's right to recovery of any Crown debts, fines, &c. *Rex v. Cotton*, Par. 112; and see *per* Patterson, J., and the other judges in *Giles v. Grover*, 9 Bing. 128. Moreover, goods taken under a *fi. fa.*, but not sold before the *teste* of the extent may be seized under the extent.

Crops.

Rex v. Wells and Althutt, 16 East, 278. Nor, again, is the Crown affected by the statutory provision under 56 Geo. 3, c. 50, relative to growing crops. *Rex v. Osbourne*, 6 Price, 94.

Saving of prerogative of Crown.

And provision is made for saving the prerogative of the Crown by sect. 5 of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104).

But by sect. 150 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), "save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown." Nevertheless, the provisions of the Bankruptcy Act, 1883, which take away the priority of the Crown over other creditors in the distribution of assets in bankruptcy, have not, by virtue of the assimilating provisions contained in the Judicature Act, 1875, s. 10, been incorporated into the Companies Act, 1862, so as to bar the prerogative right of the Crown to issue process and thus to obtain payment in full, in priority over other creditors, in respect of a debt due from a company in course of liquidation under the Companies Act. *In re Oriental Bank Corporation, Ex parte The Crown*, 28 Ch. D. 643.

Priority of Crown taken away in distribution of assets in bankruptcy;

but not in liquidation of a company under Companies Act, 1862.

"Where an extent and *fieri facias* both come to the sheriff, and the extent is delivered to him before a sale of the goods under the *fieri facias*, he certainly should not proceed with the *fieri facias* without being indemnified by the plaintiff on the *fieri facias*. If the plaintiff on the *fieri facias* will not indemnify him, he should, when he is ruled to return the writ, apply to the Court out of which it issued to enlarge the time to make his return, which will, it seems, be granted on an affidavit of the circumstances." West, 113.

Procedure when extent and *fi. fa.* both delivered to sheriff.

Disputing Crown Debt and Adverse Claims.

If a defendant disputes a debt or there be an adverse claimant to the property set forth in the inquisition, the defendant or such adverse claimant must enter an appearance for such purpose upon the sheriff's seizure under the inquisition being returned into Court; whereupon he will be allowed to plead to the extent, and, on joinder of issue thereon, such dispute or claim is, it seems, decided in the usual manner in actions between subjects. As already indicated, it appears that the proper time for the defendant appearing and disputing the claim is when the inquisition is taken before the sheriff and jury.

Disputing Crown debt and adverse claims.

A person, claiming to be an incumbrancer on lands seized by the Crown under an extent and inquisition against a Crown

debtor, is not entitled to notice of the holding a further inquisition under another extent against the same person on a similar charge of prior date, although on the first inquisition the jury had returned him an incumbrancer on the estate belonging to the debtor. *Ree v. Rawlings, Ex parte Wilkinson*, 12 Price, 834.

It is sufficient if a defendant claiming goods seized under an extent traverses the property being in the debtor to the Crown's debtor at the time of the seizure or of taking the inquisition, and it is not necessary to say that the property was not in the debtor at the time of the issuing the extent. *Rex v. Lambton*, 5 Price, 428.

An inquisition is not to be lightly set aside. *Ramsbottom and others v. Rex*, 7 Price, 570.

Discharge of Debtor.

Duties of
sheriff, &c. on
receipt of debt
to Crown.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 11 sub-s. 1. "Where a sheriff or his officer or other person employed in collecting by process from any Court any debt due to the Crown receives from any person a sum due to the Crown he shall give a receipt to such person for that sum, and the sheriff at the next account after a sum due to the Crown has been paid to him or his officer, shall procure the effectual discharge of the debtor paying the same."

Receipt to be
given.

By sub-s. 2, "An officer of a sheriff receiving any such sum shall account for it to the sheriff, and the sheriff shall give a receipt for such sum."

Liability of
sheriff, &c.
in case of
default.

By sub-s. 3, "In case of any default under this section the sheriff and his heirs, executors, and administrators, shall be liable to pay any damages suffered by a debtor in consequence of such default."

Return on Inquisition.

Inquisition.

County of (to wit). An inquisition indented taken at the house of known by the name or sign of the in the said county the day of in the year of the reign of our sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., before me sheriff of the said county, by virtue of her Majesty's

writ of extent to me directed and to this inquisition annexed on the oaths of A. B. [*here name the twelve jurors*] honest and lawful men of my bailiwick who being chosen tried and sworn on their oath say that C. D. in the said writ named is possessed of the goods and chattels following that is to say [*here state the goods*] as of his own goods and chattels and the said jurors do appraise and value the same at the sum of £ all which said goods and chattels I the said sheriff have seized and taken into her Majesty's hands. And the jurors aforesaid upon their oath aforesaid further say that the said C. D. is seized in his demesne as of fee of and in, &c., with the appurtenances thereto belonging situate and being at in the parish of in the said county and in the occupation of of the clear yearly value of £ in all issues beyond reprises which I the said sheriff have seized and taken into her Majesty's hands (c): and that the said C. D. has not any other or more goods or chattels, debts, credits, specialties, or sums of money or any other or more lands or tenements in my bailiwick, to the knowledge of the said jurors, which can be extended appraised or seized into her Majesty's hands.

In witness, &c.

G. H., &c.

Return of Sheriff to Extent against simple contract Debtor to the Crown.

The within-named C. D. is not found in my bailiwick. The residue of the execution of this writ appears in the inquisition annexed.

The answer of, &c.

The following are, it seems, also proper returns by the sheriff, viz., that the Crown debtor does not possess any goods or lands; that the lands, &c., are already extended; *cepi corpus* and the seizure of the lands; that the Crown debtor is a clerk (Dalt. Sh. 234); that the effects are in another's possession (*Reg. v. Austin*, 10 M. & W. 692); that a third party is in by descent (*Fitz. Ret.* 112). But a return by the sheriff that he has delivered the debtor's lands, without stating that he has no other lands, is, it seems, bad. (Brownl. 37.)

It will be borne in mind that the sheriff's seizure of lands under an extent is merely nominal, and that he does nothing but find them through the medium of the jury, which finding is the seizure, and also that the sheriff has no power on an extent to collect or levy the debts due to the Crown debtor, but only to seize them, and that such seizure is a seizure in law, or, in other words, is merely nominal; and further, that any goods and chattels, seized under an extent, are only to be sold by the

Returns.
Seizure of
lands and
debts:
nominal.

Goods, &c. to
be sold only
under *crediti-
tioni exponas*.

(c) Amplify form in respect of any debts, credits, &c.

price he can, and at least for that price at which they were appraised, and to have the proceeds of the sale before the [Court] to be paid to [it] to the use of the Crown. If the sheriff cannot sell the goods for the appraised price, he should return that fact, and then a *venditioni exponas* issues for him to sell *pro optimo pretio* without reference to the appraisement. The sheriff must make a return of the whole sum produced by the sale, when the Court will order it to be paid over, deducting poundage, and he must move the Court for any extra allowance to which he may be entitled." *Ib.* 220. The debtor is entitled to notice of the intended sale. *R. v. Mares*, 2 Price, 155; 6th ed. Atk. 252. *Venditioni exponas pro optimo pretio.*
Debtor entitled to notice of sale.

As to the return under "Writ of *Venditioni Exponas*," see under that title, *ante*, p. 119. Return under *venditioni exponas*.

As previously intimated, the mode of compelling payment of the debts due to the Crown debtor is by suing out a *scire facias* or an immediate extent against the debtors of the Crown debtor after the return of the inquisition. Mode of compelling payment of debts.

Fees.

As to sheriff's fees under writ of extent, see under title "Sheriffs' Fees, &c.," *post*, p. 505.

CHAPTER XII.

ARREST.

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Introductory.

Arrest
process.

THE subject of arrest process includes the writs of attachment, *capias ad satisfaciendum*, *ne exeat regno*, *contumace capiendo*, and *habeas corpus*, and also orders of arrest and committal granted by the Court.

Writ of
attachment.

The writ of attachment which is directed to the sheriff commanding him to attach the body of a person is the proceeding

usually employed for enforcement of obedience to the orders, rules, writs and other process of the Court and generally for punishment of contempts. It is also issued on the Crown side of the Court, upon application being made, for the purpose of compelling parties to appear to answer articles of the peace exhibited against them. It may also be obtained against a prisoner already in the sheriff's custody. Moreover, according to 14th ed. Chit. Arch. p. 897, if any person obstruct the execution of the process of the Court, the Court will upon an affidavit of the facts grant an attachment against him, for example, on a sheriff's return of rescue. It has now, however, ceased to be resorted to in many cases to which it appears applicable, as, *e. g.*, for disobedience to orders for payment of money since the Debtors Act, 1869. As to judgments and orders enforceable by attachment, see R. S. C., 1883, Ord. XXXI. rr. 21, 23, and Ord. XII. r. 18.

An order for committal may be granted by the Court (a) for Committal. contempt of Court; (b) to enforce obedience to a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything; (c) in bankruptcy under sect. 5 of the Debtors Act, 1869; and (d) to compel the sheriff to return a writ or to bring in the body of a person ordered to be attached or committed.

Attachment differs from committal in this, that whereas the former is effected by a writ issued by leave of the Court and directed to the sheriff, the latter is directed to be made by an order of the Court, and is carried out by the tipstaff, without the sheriff's aid.

Referring to the Debtors Acts, by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4—

“With the exceptions hereinafter mentioned, no person shall, after the commencement of this [1869] Act, [January 1st, 1870,] be arrested or imprisoned for making default in payment of a sum of money.

“There shall be excepted from the operation of the above enactment:

“(1.) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:

“(2.) Default in payment of any sum recoverable summarily before a justice or justices of the peace:

“(3.) Default by a trustee or person acting in a fiduciary

Difference between attachment and committal.

Abolition of imprisonment for debt, with exceptions.

capacity and ordered to pay by a court of equity any sum in his possession or under his control :

- “(4.) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order :
- “(5.) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order :
- “(6.) Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made: Provided, first, that no person shall be imprisoned in any cases excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money except as regards the arrest and imprisonment of the person making default in payment of such money.”

Court or judge to have discretion in cases within exceptions 3 and 4 in 32 & 33 Vict. c. 62, s. 4, and 35 & 36 Vict. c. 57, s. 5, respectively.

By the Debtors Act, 1878 (41 & 42 Vict. c. 54), s. 1, “In any case coming within the exceptions numbered 3 and 4, in the fourth section of the Debtors Act, 1869, and in the fifth section of the Debtors Act (Ireland), 1872, respectively, or within either of those exceptions, any Court or judge, making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the provisos contained in the said sections respectively) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder.”

Saving of power of committal for small debts.

By the Debtors Act, 1869, sect. 5, “Subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court.

“Provided (1) that the jurisdiction by this section given of committing a person to prison shall, in the case of any Court

other than the superior Courts of Law and Equity, be exercised only subject to the following restrictions; that is to say,

- “(a) be exercised only by a judge or his deputy, and by an order made in open Court and showing on its face the ground on which it is based
- “(b) be exercised only as respects a judgment of a superior Court of Law or Equity, when such judgment does not exceed 50%, exclusive of costs;
- “(c) be exercised only as respects the judgment of a county court, by a county court judge or his deputy.

“(2.) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same. Persons committed under this section by a superior Court may be committed to the prison in which they would have been confined if arrested on a writ of *capias ad satisfaciendum*, and every order of committal by any superior Court shall, subject to the prescribed rules, be issued, obeyed, and executed in the like manner as such writ.”

Sub-sect. (b) of sect. 5 of the Debtors Act, 1869, is, however, now repealed by the Fifth Schedule of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the jurisdiction of the High Court under that section having been transferred by that Act to the judge and registrars in bankruptcy. As to which see Bankruptcy Act, 1883, s. 103, and Bankruptcy Rules, 1886, rr. 355—362.

By the Debtors Act, 1869, sect. 6, “After the commencement of this Act a person shall not be arrested upon mesne process in any action. Where the plaintiff in any action in any of her Majesty’s Superior Courts of Law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a judge of one of those Courts, that the plaintiff has good cause of action against the defendant to the amount of 50% or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and

Power under certain circumstances to arrest defendant about to quit England.

until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court. Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison."

Writ of *capias ad satisfaciendum*.

With regard to the different branches of arrest process, a writ of *capias ad satisfaciendum* is a writ whereby the sheriff is commanded to take the body of the defendant and him safely keep, so that he may have his body in Court to satisfy the plaintiff the amount of the judgment and interest thereon at 4 per cent. Although since the practical abolition of imprisonment for debt, this writ is now rarely resorted to, it still lies in the cases mentioned in sub-sects. 1, 3, and 4, sect. 4 of the Debtors Act, 1869, and in the case of Crown debts. As a general rule, a *ca. sa.* only lies in cases where a *capias ad respondendum* [as to *capias ad respondendum*, see under title "Outlawry," *post*] would formerly. 14th ed. Chit. Arch. pp. 889, 892; and see *infra* as to adoption of this writ in relation to execution against prisoners in custody of the sheriff. A *capias ad satisfaciendum* may also be issued in default of appearance for sentence (see C. O. R., 1886, r. 276), and on outlawry after judgment, as to which see under title "Outlawry," *post*, p. 226.

Writ of *ne exeat regno*.

As to writ of *ne exeat regno*, according to the Annual Practice, 1894, p. 1161, and cited authorities, this writ is granted to prevent a person from leaving the realm to the damage of the person to whom he is indebted, until he has given security for the amount of the debt, and in order to obtain this writ the demand must be pecuniary, must be actually due, and for an ascertained amount. Moreover, the debt must be payable *in presenti*, and under the present practice this writ is not to be issued except in cases which come within the provisions of sect. 6 of the Debtors Act, 1869.

Writ of *contumace capiendo*.

A writ of *contumace capiendo* is for the attachment of a person who is contumacious and contemns the authority of the law and ecclesiastical jurisdiction.

Writ of *habeas*

"The writ of *habeas corpus* lies in civil as well as in criminal

cases. In criminal cases the writ and proceedings depend on the statute 31 Car. 2, c. 2. The writ of *habeas corpus*, in civil cases, is a judicial writ commanding the sheriff, or other officer to whom it is directed, to have the body of the defendant, together with the day and cause of taking and detaining him, before the Court or a judge, on a day *certain* in term time, or *immediate* to answer or satisfy the plaintiff, or generally to do and receive what the Court or judge shall consider of him." 2nd ed. Watson Sher., p. 235. The following are the different kinds of *habeas corpus* with the purposes for which they are used, viz.:—*Habeas corpus ad subjiciendum* (the remedy for all kinds of illegal confinement); *habeas corpus ad testificandum* (for bringing up prisoners to give evidence); *habeas corpus ad respondendum* (for bringing up a prisoner for examination or trial on a criminal charge); *habeas corpus ad deliberandum* and *recipias* (for the removal of a prisoner from one gaoler to another); *habeas corpus* to bring in the body of a defendant on return of *cepi corpus* (and as to which latter process, see C. O. R., 1886, r. 263); and *habeas corpus ad satisfaciendum* in connection with execution against prisoners. It would appear that the writ of *habeas corpus* to bring in the body of a defendant on a return of *cepi corpus* is practically now the only writ of *habeas corpus* directed to the sheriff.

With regard to the practice applicable to arrest process, see (a) R. of S. C., 1883, Ord. XLIV. (a) (which, however, it seems does not extend to Crown side proceedings); (b) for the practice applicable to writs of attachment generally, in common with other writs of execution, see Ord. XLII. (Ord. XLII. applies as far as it is applicable to all civil proceedings on the Crown side, C. O. R., 1886, r. 217); and (c) so far as applicable, R. of S. C., 1883, Ord. LII. (motions and other applications), and connected therewith, C. O. R., 1886, r. 250. See also the following C. O. R., 1886, viz., rr. 217—228 (Execution); rr. 229—234 (Writs); rr. 235—249 (*Habeas corpus*); rr. 250—260 (Motions); rr. 261—276 (Attachment for Contempt); rr. 277—279 (*De contumace capiendo, excommunicato capiendo*); rr. 280—292 (Articles of the Peace), and connected therewith, rr. 123—126 (Recognizances); rr. 83—98 (Appearance to Indictment, Information and Inquisition), and as to "Time," see C. O. R., 1886, rr. 293—298 (Time), and R. S. C., 1883, Ord. LXIV. (Time), and Ord. LXIII. (Sittings

corpus, and in what cases it lies.

Practice applicable to arrest process.

(a) For the Rules of the Supreme Court, 1883, and the Crown Office Rules, 1886, see Chap. III. "General Practice."

and Vacation). As to attachment for appearing to an information, this writ of attachment is to be issued at the Crown Office and lodged at the office of the under-sheriff of the county, &c., to be executed like other writs of attachment. Short & Mellor's Prac. of the C. O., p. 412; and see that work for further information on this branch of arrest, including the incidental process of *supersedeas* on appearance. See also that work at pp. 410, 411, for further information as to the practice relating to attachment against a prisoner; and at pp. 412—414 as to attachment on a return of rescue. And see the same authority, p. 782, as to duration of order for attachment, and at pp. 414, 415, 416, as to setting aside a writ of attachment.

Practice applicable to arrest under Debtors Acts.

The practice in regard to arrest under the Debtors Acts is chiefly governed by (1) the Debtors Act, 1869, ss. 4, 5, and 6, *ante*, p. 155; the Debtors Act, 1878, s. 1, *ante*, p. 156; (2) the General Rules under the Debtors Act, 1869, Mich. Term, 1869; and (3) the following Rules of the Supreme Court, viz., R. of S. C., 1883, Ord. XLII. r. 25 (as to date, duration, and renewal of order of commitment under the Debtors Act, 1869), and *ib.*, Ord. LXIX. (relating to arrest of defendant under the 6th section of that Act); whilst, as to the practice in relation to arrest under sect. 6 of the Debtors Act, 1869, see the Annual Practice, 1894, p. 1161, and 14th ed. Chit. Arch. p. 1491.

Issuing and indorsing *ca. sa.* and *ne exeat regno*.

As to writ of *capias ad satisfaciendum*, see, as to when it is to be sued out, R. of S. C., 1883, Ord. XLII. rr. 19 and 22, and as to mode of suing out and indorsing it, *ib.* rr. 11 and 12, and Chit. Arch., 14th ed., pp. 889 *et seq.*; and see as to writ of *ne exeat regno*, R. of S. C., 1883, Ord. LXVI. r. 7 (j).

Writ *de contumace capiendo*.

The writ of *contumace capiendo* is chiefly governed by 5 Eliz. c. 23; 53 Geo. 3, c. 127, s. 1; 2 & 3 Will. 4, c. 93, ss. 1, 2, and 3; 3 & 4 Will. 4, c. 41, s. 28; 3 & 4 Will. 4, c. 93, s. 1; the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 5; and the C. O. R., 1886 (*de contumace capiendo*, *excommunicato capiendo*), rr. 277—279, *ante*, p. 44, which rules, it will be observed, also regulate the practice applicable to *capias super contumace capiendo*. The power to issue a writ *de contumace capiendo* under 53 Geo. 3, c. 127, for disobedience of an order of the Ecclesiastical Court, is not confined to cases where obedience to the order remains possible. *Ex parte Rev. James Bell Cor.*, 30 Q. B. D. 1; 57 L. J. Q. B. 95. This writ, it appears, is executed in the same way as an attachment, except that it is sufficient for the sheriff to return it with the manner of its execution. 5 Eliz.

Return.

c. 23, s. 2. At return day of the writ the sheriff, or other officer to whom the writ or other process shall be directed, is not compellable to bring in the body; but on return of *non est inventus*, *capias* shall issue, returnable in term time two months after the *teste*, with proclamations against the party to, within six days next after such proclamation, surrender as a prisoner to the sheriff or such other officer according to the tenor and effect of the first writ of *excommunicato capiendo*, and thereupon, after such proclamation had, and the expiration of such six days, the sheriff, or such other officer, shall make return of such writ of *capias* of all that he has done in its execution, and whether the party therein named have so yielded his body to prison or not, under forfeiture of 10*l.*, and on such party's default such forfeiture shall be estreated and a fresh *capias* with like proclamation to surrender on forfeiture of 20*l.* shall issue, and so continually until the party shall surrender. 5 Eliz. c. 23, ss. 4—7. When the party surrenders to the hands of the sheriff, or other officer, upon any of the said writs of *capias*, he shall remain in the custody of such sheriff, or other officer, without bail in like manner as under writ of *excommunicato capiendo*. *Ib.* s. 3; and see C. O. R., 1886, r. 279.

A writ *de contumace capiendo* is bad, and will be set aside, if it be directed to the sheriff of one county, and it appear by the writ that the defendant is resident in another. *Rex v. Ricketts*, 6 A. & E. 537; *Rex v. Hewitt*, *ib.* 547. According to Patteson, J., in the case of *Rex v. Hewitt*, the writ can go only to the sheriff of the county of which the defendant is described to be. On his returning "*non est inventus*," a *capias super contumace* may issue into any other county.

The practice applicable to *habeas corpus* is, as already intimated, chiefly regulated by 31 Car. II. c. 2. See also (1) as to *habeas corpus ad subjiciendum*, 16 Car. I. c. 10, s. 8, 56 Geo. III. c. 100, ss. 1, 2, 3, 4, and 6, 26 Vict. c. 20, 39 & 40 Vict. c. 36, ss. 243 and 244, The Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 11 and C. O. R., 1886, r. 35 (*certiorari*), rr. 235—245 (*habeas corpus ad subjiciendum*), rr. 246—249 (other writs of *habeas corpus*), rr. 250—254 (motions), and r. 305 (applications at chambers); (2) as to *habeas corpus ad testificandum*, 44 Geo. III. c. 102, 52 & 53 Vict. c. 49, s. 18 (2), and C. O. R., 1886, rr. 246, 247 (other writs of *habeas corpus*); (3) as to *habeas corpus ad respondendum*, 43 Geo. III. c. 140, and C. O. R., 1886, rr. 246—249 (other writs of *habeas corpus*); and (4) as to *habeas corpus ad*

Practice
applicable
to writ of
habeas corpus.

deliberandum and recipias, see in particular sect. 9 of 31 Car. II. c. 2 (as partially qualified by The Prisons Act, 1865, 28 & 29 Vict. c. 126, ss. 63 and 64, and The Prisons Act, 1877, 40 & 41 Vict. c. 21, s. 28), 38 Geo. III. c. 52, s. 3, and C. O. R., 1886, rr. 246—248 (other writs of *habeas corpus*); and (5) as to the practice relating to the writ of *habeas corpus ad satisfaciendum*, see 14th ed. Chit. Arch. pp. 1194 *et seq.*

Writs of *habeas corpus*, granted by a judge, are now indorsed with his name instead of his signature as was formerly required.

Forms of Writs.

1. *Writ of Attachment* (Form No. 12, App. H., R. S. C. 1883).

18 . [*Here put the letter and number*].

18 . B. No. .

In the High Court of Justice.
Division.

Between A. B. - - - - - Plaintiff.

and

C. D. - - - - - Defendant.

VICTORIA, by the grace of God, &c., To the sheriff of ,
greeting:

We command you to attach C. D. so as to have him before Us in the division of Our High Court of Justice wheresoever the said court shall then be, there to answer to Us, as well touching a contempt which he it is alleged hath committed against Us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as Our said Court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, &c.

2. *Writ of Attachment* (Form No. 190, C. O. R. 1886).

VICTORIA, by the grace of God, &c. To the sheriff of ,
greeting:

We command you to attach C. D., so that you may have him before Us in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, on the day of 189 , to answer to Us for certain trespasses and contempts brought against him in Our said Court: and have you then there this writ.

Witness, &c.

3. *Writ of Attachment to answer an Information* (Form No. 54,
C. O. R. 1886).

VICTORIA, by the grace of God, &c., To the sheriff of ,
greeting :

We command you to attach A. B., if he shall be found in your bailiwick, and him safely keep, so that you may have his body, before Us in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, on the day of 189 , to answer to Us for certain misdemeanours whereof he is impeached, and that you have then there this writ.

Witness, &c.

4. *Writ of Attachment to answer Information Quo Warranto* (Form
No. 55, C. O. R. 1886).

[Same as No. 3.]

[*Except that instead of the words "to answer to Us for certain misdemeanours, &c.," say:—* to answer to Us upon an information in the nature of a Quo Warranto exhibited against him by Frederick Cockburn, Esquire, Our coroner and attorney in the Queen's Bench Division of Our High Court of Justice, to show by what authority he claims to be, &c.

This writ was issued by, &c.

5. *Attachment on the Return of a Rescue* (Form No. CCXLV. from
Short and Mellor's Practice of the C. O.).

VICTORIA, &c. To the sheriff of greeting :

We command you that you do not forbear, &c. but that you attach A. B., if he shall be found in your bailiwick, and him safely keep so that you may have him before Us in the Queen's Bench Division of Our High Court of Justice at the Royal Courts of Justice, London, on the day of to answer to Us for certain trespasses, contempts, and rescues whereof by your return (*or* the return of sheriff of the county of) he is impeached. And that you have there this writ.

Witness, &c.

6. *Writ of Attachment for the Peace* (Form No. 196, C. O. R. 1886).

VICTORIA, by the grace of God, &c., to the sheriff of , greeting ; Because A. B. was afraid that he might be in many ways disquieted and made grievous concerning his life and maiming of his limbs by C. D., as the said A. B. has made oath before Us ; therefore We command you that you attach the said C. D. so that you may have him before Us on the day of to find then before Us sufficient security for the keeping of Our peace by him towards Us and all Our people, and especially towards the said A. B., under a certain penalty then to be imposed on him by Us, and when you have so attached the said C. D. you are to discharge him on bail until the said day by sufficient manueaptors, who shall be willing to bail him under a certain penalty reasonably to be

imposed upon them by you, as well for the keeping his day as for the keeping Our peace by him in the meantime. Witness, &c.

(*To be indorsed*)

This writ is granted on motion in open Court and the cause thereon recorded according to the form of the statute in such case made and provided.

This writ was issued by, &c.

7. *Writ of Capias ad Satisfaciendum.*

18 . [*Here put letter and number.*]

In the High Court of Justice.

Division.

Between A. B. - - - - - Plaintiff.

and

C. D. - - - - - Defendant.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting:

We command you that you [omit not by reason of any liberty of your county, but that you enter the same and] (*b*) take C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice immediately after the execution hereof, to satisfy A. B. £ , together with interest thereon at the rate of £ per centum per annum from the day of 18 [*the day on which judgment was entered*] which said sum of money and interest were lately before Us in Our High Court of Justice in a certain action wherein A. B. is plaintiff and C. D. is defendant, by a judgment of Our said Court bearing date the day of , adjudged to be paid by the said C. D. to A. B. [*following the terms of the judgment*] and have you there then this writ. Witness (*name of Lord Chancellor*), Lord High Chancellor of Great Britain, the day of in the year of our Lord .

(*To be indorsed*)

Levy the whole [*or* 'levy £ '] and interest thereon [*or* 'on £ '] at £4 per cent. from the day of , 18 , and £ for this writ and warrant thereon, besides sheriff's and officers' fees, and other expenses of the execution.

This writ was issued by X. Y. of , solicitor, [*or* 'agent for X. Y. of , solicitor'] for the within-named plaintiff [*or if the writ was issued in person, say, 'issued by A. B. the plaintiff,*

(*b*) The *non-omittas* clause is not inserted in the form of writ given in the App. to R. of S. C. 1883. Where there is such a clause, "no warrant to the bailiff of a liberty is required where it is to be executed within the liberty, for the sheriff and not the bailiff must execute a writ containing such a clause." 6th ed. Atk. 226, and cited authority.

in person, who resides at _____, 'mentioning the city, town, or parish, and also the name of the hamlet, street and number of the house of the plaintiff, if such there be].

The defendant is a _____, and his place of abode is No. _____, street.

8. *Writ of Capias ad Satisfaciendum after Judgment* (Form No. 144, C. O. R. 1886).

VICTORIA, by the grace of God, &c., to the sheriff of _____, greeting :
We command you that you take A. B., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice, on the _____ day of _____, 18____, to satisfy Us concerning his redemption by reason of certain _____, whereof he is indicted, and thereupon by a jury of the country taken between Us and the said A. B. [or by his own default or confession] he stands convicted, as in Our said Court before Us it appears upon record. And have you then there this writ. Witness, &c.

9. *Writ of Capias to answer to Indictment, or Information*
(Form No. 57, C. O. R. 1886).

VICTORIA by the grace of God, &c., to the sheriff of _____, greeting :

We command you that you take A. B., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice at the Royal Courts of Justice, London, on the _____ day of _____ 189____, to answer to Us for certain misdemeanors [or felonies] whereof he is indicted [or impeached]. And have you then there this writ.

Witness, &c.

10. *Writ of Ne Exeat Regno.*

VICTORIA, &c. ; Because We are given to understand that _____ purposes to go over towards foreign parts (to prosecute there many things prejudicial and hurtful to Us and many of Our people): We willing to resist his malice in this behalf command you firmly enjoining that you cause the aforesaid _____ to come corporally before you and by what means you can compel him to find sufficient manucaptors who will bail him under a certain penalty to be reasonably imposed on them by you, for which you will answer to Us. In witness, &c.

Or thus—

And him the said _____ to find sufficient security under the penalty of £ _____ to be paid to Our use or any one of them in the penalty of, &c. that he go not towards foreign parts without Our special licence, nor presume to prosecute or cause to be attempted to be prosecuted anything whatsoever there which may be able to prevail to the contempt of Us or to the prejudice or damage of Our people, nor send any person or persons there for that purpose. And if he shall

refuse to do this before you that then you do commit him the said
to Our next gaol to be kept safely in the same until he will
freely do so; and when you shall have so taken that security there-
upon without delay distinctly and openly inform Us thereof, or
certify in Our Chancery under your seal remitting to Us this writ,
&c. Witness, &c.

11. *Writ of Contumace Capiendo* (Form No. 194, C. O. R. 1886).

VICTORIA, by the grace of God, &c., to the sheriff of , greeting:

Whereas, A. B. has signified to Us, &c., that C. D., of, &c. in your
county of is manifestly contumacious and contemns the juris-
diction and authority of the law and jurisdiction ecclesiastical of
[*here state the contempt charged*], nor will C. D. submit to
the ecclesiastical jurisdiction, but forasmuch as the royal power
ought not to be wanting to enforce such jurisdiction, We command
you that you attach the said C. D. by his body until he shall have
made satisfaction for the said contempt, and how you shall execute
this Our precept notify unto Us on the day of at Our
Royal Courts of Justice, London. And in nowise omit this and
have you there then this writ.

Witness Ourself at Westminster the day of in the
year of Our reign.

(Signed) ESHER,
(Master of the Rolls.)

(*To be indorsed after delivery into Court.*)

This writ is allowed and delivered of record before our Lady the
Queen in the Queen's Bench Division of Her Majesty's High Court
of Justice, at the Royal Courts of Justice, London, the day of
, 18 , according to the form of the statute in such case made
and provided.

In Court.

12. *Writ of Capias cum Proclamatione super Contumace Capiendo*
(Form No. 195 C. O. R. 1886).

VICTORIA, by the grace of God, &c., to the sheriff of greeting:

Whereas [*recite the writ of contumace capiendo throughout in the
past tense*].

And whereas, in obedience to the said writ, you returned to Us
that [*recite the return which should state that (the defendant) cannot
be found in the sheriff's bailiwick*], as in the Queen's Bench Division
of Our High Court of Justice before Us it appears upon record.
Therefore, according to the form of the statutes in such case made
and provided, We command you that you take the said , if
he shall be found in your bailiwick, and him safely keep, so that he
may make satisfaction for the said contempt, and if the said
shall not be found in your bailiwick, that then you cause open pro-
clamation to be made ten days at least before the return of this writ
in your full County Court, or else at the general assizes and gaol
delivery to be holden within your said county or at a quarter ses-
sions, to be holden before the Justices of the peace within your said

county, according to the form of the statutes that the said shall, within six days next after such proclamation, yield his body to Our prison of your said county, there to remain as a prisoner according to the tenor and effect of Our said first writ to you [*or to the then sheriff*] before directed, under pain of forfeiture of *ten pounds* (c) of lawful money of Great Britain, and how you shall execute this Our writ make known to Us at the Royal Courts of Justice, London, on the day of next, that We may cause further to be done thereon what of right and according to the form of the statutes in such case made and provided, shall be meet to be done.

Witness, JOHN DUKE, BARON COLERIDGE, at the Royal Courts of Justice, London, the day of in the year of Our Lord one thousand, &c.

13. *Writ of Capias cum Proclamatione into a Foreign County*
(Form No. 60, C. O. R. 1886).

VICTORIA, by the grace of God, &c., to the sheriff of greeting:

We command you that you take A. B., if he shall be found in your bailiwick, and him safely keep so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, on [*three or four months between teste and return, as the case may be*] the day of next, to answer to Us for certain [*misdemeanors*] whereof he is indicted; and if you cannot find the said A. B. in your bailiwick, that then you make public proclamation in two County Courts of your county before the return of this writ, that he be before Us at the aforesaid day to answer to Us concerning the premises according to the Rule in that case made and provided, and have you then there this writ.

Witness, &c.

This writ was issued by, &c.

14. *Writ of Habeas Corpus on Return of Capi Corpus*
(Form No. 192, C. O. R. 1886).

VICTORIA, by the grace of God, &c., to the sheriff of greeting:

We command you that you have the body of before Us in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, forthwith after the receipt of this Our writ, to answer to Us for certain trespasses and contempts brought against him in Our said Court before Us and whereof by your return sent to Us you have charged yourself. And have you then there this writ.

Witness, &c.

(c) The second *capias* twenty pounds, and the like sum in every subsequent writ.

The under-mentioned extract from Chitty's Forms p. 762 will, moreover, be of service :—

[*The following indorsements must be made on the order.*] This order was issued by _____ of _____, solicitor for the plaintiff within named [*or if the order was sued out by a solicitor as agent for another solicitor in the country, say, "This order was issued by (the agent's name) of _____, as agent for _____ of _____ solicitor for the plaintiff within named "*], [*or, if the writ was sued out by the plaintiff in person, say "This order was issued in person by the plaintiff (or, if more than one, name them all accordingly) within named, who resides at " (mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be)*]. (See 1 Pr. 13th ed. 617 n.)

There is also another indorsement to be made by the officer executing the writ, of the day of executing it. But this of course cannot be made until after the arrest. It runs as follows: "The within named _____ was arrested by me _____ by virtue of this order on the _____ day of _____."

2. *Order when the Action is for a Penalty or Sum in the Nature of a Penalty irrespective of any Contract.*

[*Proceed as in preceding form to the asterisk *, and then thus*]:—That any sum recovered against him in this action shall be paid, or that he shall be rendered to prison.

And [*&c. as in preceding form*].

3. *Order for Committal of Judgment Debtor(d)* (Form No. 48 App. K,
R. of S. C. 1883).

18 . [*Here put the letter and number*).

In the High Court of Justice,

Division.

Judge in Chambers.

Between - - Judgment creditor,
 and
 - - Judgment debtor.

UPON hearing and upon reading the affidavit of filed
the day of 18 , and ,

It is ordered that the above-named judgment debtor be, for default in payment of the debt hereinafter mentioned, committed to prison for the term of _____ from the date of his arrest, including the day of such date, or until he shall pay £ _____, being the amount due from him in pursuance of a judgment [or order] of the High Court of Justice bearing date the _____ day of _____, 18 _____, together with interest thereon at £4 per cent. per annum from the

(d) Forms Nos. 3 and 4 are no longer in use in the Q. B. Chambers, proceedings relating to them having been transferred to the Bankruptcy Court. See *ante*, p. 157.

aforesaid date, and £1 6s. 8d. for costs of this order, and sheriff's fees for the execution thereof.

And it is further ordered that the sheriff take the said debtor for the purpose aforesaid if he is found within his bailiwick.

And it is ordered that the costs of this application be .
Dated the day of 18 .

4. *Order for Committal of Judgment Debtor on Non-payment of Instalment* (Form No. 49 App. K., R. of S. C. 1883).

[*Heading as in preceding form.*]

UPON hearing and upon reading the affidavit of filed
the day of 18 , and ,

It is ordered that the above-named judgment debtor be for default in payment of £ , being the amount of the [*first*] instalment of the judgment debt of £ , in this action directed to be paid pursuant to the order of bearing date the day of 18 , committed to prison for the term of from the date of his arrest, including the day of such date, or until he shall pay the said instalment together with 13s. 4d. the costs of this order, and sheriff's fees for the execution thereof. And it is further ordered that the sheriff of take the said debtor for the purpose aforesaid if he is found in his bailiwick.

And it is ordered that the costs of this application be .
Dated the day of 18 .

Forms of Warrants.

1. *Warrant on Attachment.*

County of to wit: Sheriff, of the county aforesaid to the keeper of the gaol of the said county and also to and my bailiffs, greeting: By virtue of a writ of our Sovereign Lady the Queen to me directed, I command you and every of you jointly and severally that you omit not by reason of any liberty in my bailiwick, but that you or one of you enter the same and attach if he shall be found in my bailiwick and him safely keep, so that I may have his body before her Majesty's High Court of Justice Division on the day of to answer her Majesty concerning divers trespasses, contempts and offences by him done and committed. Hereof fail not as you will answer at your peril. Given under the seal of my office this day of in the year of our Lord one thousand eight hundred and ninety .

By the same sheriff
(*Seal of Office.*)

2. *Warrant on Attachment for the Peace.*

——— to wit: Esquire, sheriff of the county of aforesaid to and my bailiffs greeting: By virtue of the Queen's writ of attachment for the peace to me directed, I command

each and every of you jointly and severally that you omit not by reason of any liberty in my bailiwick but that you enter the same and take if he shall be found in my bailiwick and him safely keep until he shall have given me bail as in the said writ is commanded. And in what manner you shall have executed this warrant certify to me immediately after the execution thereof. Given under the seal of my office this day of 18 .

By the sheriff
(*Seal of Office.*)

3. Warrant on a Ca. Sa.

—— to wit: S. S., Esquire, sheriff of the said county, [to the keeper of the gaol of the said county and] to B. B. my bailiff, greeting:—By virtue of Her Majesty's writ to me directed and delivered, I command you, that you [omit not by reason of any liberty in my county, but that you enter the same and] take C. D. where-soever he may be found in my bailiwick, and him safely keep, so that I may have his body before our lady the Queen in the Division of Her Majesty's High Court of Justice, immediately after the execution hereof [or "on ," if the writ be returnable on a particular day], to satisfy A. B. of £ , which the said C. D. in the Queen's Bench Division of Her Majesty's said High Court of Justice was ordered to pay to the said A. B. together with interest [*&c. as in the ca. sa.*] and have you this warrant, and fail not at your peril. Given under the seal of my office, the day of , A.D.

By the sheriff
(*Seal of Office.*)

Mr. X. Y., solicitor for the plaintiff.

The writ issued the day of .

Take no bail whatever.

4. Warrant on Ne Exeat Regno.

County of to wit. sheriff of the county aforesaid, to the keeper of the gaol of the said county and also to my bailiffs, greeting: By virtue of a writ of our sovereign lady the Queen to me directed, bearing date the day of one thousand eight hundred and ninety I command you, and each of you, jointly and severally that you one or any of you do without delay arrest the body of and keep him safe, until he gives sufficient bail or security in the sum of that he will not go or attempt to go into parts beyond the seas without leave of the Division of the High Court of Justice of our said lady the Queen. And in case he refuse to give such bail or security, then I further command you, each and every of you, that you commit him to the prison of my county, there to be kept in safe custody until he shall do it of his own accord, and when he shall have given such security, you are forthwith to make the same known to me so that I may make

and return a certificate thereof to the said Court of our said lady the Queen distinctly and plainly under my seal of office.

Hereof fail not, as you will answer at your peril. Given under the seal of my office, this day of in the year of our Lord one thousand eight hundred and .

Writ indorsed by the Lord Chancellor of Great Britain at the instance of .

Take security in the sum of £ .

By the sheriff
(*Seal of Office.*)

5. *Warrant on Writ of Contumace Capiendo.*

— to wit Esquire, sheriff of the said county to and my bailiffs greeting: By virtue of Her Majesty's writ bearing date the day of in the year of Our Lord one thousand eight hundred and ninety to me directed and delivered I do hereby command you and each of you jointly and severally that you take of wheresoever he may be found in my bailiwick and him safely keep so that he may make satisfaction for the contempt mentioned in the said writ as in such writ I am commanded. And in what manner you shall have executed this warrant certify to me immediately after the execution hereof.

Given under the seal of my office this day of 189 .

By the sheriff
(*Seal of Office.*)

6. *Warrant on Writ of Capias cum Proclamatione super Contumace Capiendo.*

[*Adopt above form with regard to capias portion of the writ, and as to proclamations see under title "Outlawry," post, p. 227.*]

7. *Warrant to Gaoler and Bailiff to convey Prisoner on a Habeas Corpus.*

— to wit Esquire, sheriff of the said county of to keeper of the gaol of in this county, and to my bailiff (for this time specially appointed): By virtue of Her Majesty's writ to me directed I command you that you safely and securely convey the body of immediately after the receipt of this warrant to and before [*name of judge by whom writ signed*] in the Queen's Bench Division of Her Majesty's High Court of Justice at the Royal Courts of Justice, London, to do, submit, and receive what the said Court shall then and there consider of him in this behalf. Hereof fail not at your peril. Given under my hand and seal of office this day of 18 .

By the sheriff
(*Seal of Office.*)

8. *Warrant to Arrest.*

[*the county, &c. to the sheriff of which the writ is directed*]
Esquire, sheriff of the county aforesaid, to and
my bailiffs greeting: By virtue of an order of the Honourable
Sir Knight, one of the Justices of the High Court of Justice,
dated the day of to me directed, I command you, and
each and every of you jointly and severally, that you or any of you
omit not by reason of any liberty of my bailiwick, but that you
enter the same and within one calendar month from the said
day of [*date of the order*] inclusive of that day, and not after-
wards, take if he shall be found in my bailiwick and arrest
and imprison him for [*as in the order*] months from the date
of the arrest, including the day of such date, unless and until he
shall sooner deposit in Court the sum of £ or give to a
bond executed by him and two sufficient securities in the penalty
of £ or some other security satisfactory to the said that
he will not go out of England without leave of the Court [*or “that
any sum recovered against him in an action at the suit of the said
1878, B. No. shall be paid, or that he shall be rendered
to prison,” or as the case may be. All this should follow closely the
terms of the order.*] And I do further command you, or any of
you, that immediately after the execution hereof you do certify to
me the manner in which you shall have executed the same, and the
day of the execution hereof, so that I may within two days after
the arrest of the said indorse on the said order the true date
of such arrest, or that, if the same shall remain unexecuted, then
that you do so return this my warrant at the expiration of one
calendar month from the date of the said writ or sooner if thereto
required. Dated .

(Seal of Office.)

Writ issued by _____ of _____
Plaintiff's solicitor [or "by the said _____ in person"].

Before you arrest the defendant, beware he is not privileged, as an ambassador, or servant to an ambassador, or otherwise privileged or protected.

(Indorsement on order of execution thereof.)

— was arrested by me on the within order on the
day of 18 .

[If there be more than one defendant make such an indorsement for each.]

9. Sheriff's Warrant on Committal Order.

— to wit.

In the High Court of
Justice.
Division.
A. B.
Judgment Creditor
and
C. D.
Judgment Debtor.

S. S., sheriff of the county aforesaid, to
B. B. and S. B., my bailiffs, and also to
the Governor of Her Majesty's gaol [at
] and his deputies, greeting :
By virtue of an order of the Honourable
Mr. Justice dated day of
18 I command you and every of you my
said bailiffs that you or one of you take
the said judgment debtor, if he shall be found within my bailiwick,

for the purpose that he be, for default in payment of [as in the order] committed to prison for the term of [six] weeks from the date of his arrest, including the day of such date, or until he shall pay [as in the order] being the amount of the first instalment due to the said A. B. upon an order made by bearing date the day of 18 together with £ for the costs of the said order and sheriff's fees for the execution thereof. [*Let all this agree with the order.*]

And I also command the governor of and his deputies to receive and safely keep the body of the said judgment debtor accordingly.

Given under the seal of my office, this day of one thousand eight hundred and .

By the same Sheriff.

The order is indorsed as follows :—[*here copy the indorsement on the order.*]

Execution of Writs.

Preliminary. With due regard to the objects of and the directions contained in the various forms of arrest process, and to the above-mentioned practice regulating such process, the general proceedings in relation to its execution fall under the following heads; and in this connection, the law in relation to any one branch of such process, *e.g.*, that of *ca. sa.*, may be taken to be in principle more or less applicable to the other branches.

1. Initial Steps.

Delivery of writs to sheriff.

With due regard to the above-mentioned practice regulating the different branches of arrest process, writs of attachment and other process of arrest directed to the sheriff should be delivered to him in the usual way, as to which, see under "*Writ of Fieri Facias*," *ante*, pp. 53, 57.

As to information given to sheriff.

A party who issues a *ca. sa.* is not under any legal duty to give the sheriff such information as will enable him to recognize and identify the party to be arrested. *Dyke v. Duke*, 7 L. J. (N. S.) C. P. 75; 4 Bing. N. C. 197; 5 Scott, 536. But a solicitor of a party issuing a writ of *ca. sa.* is liable to an action by the sheriff for any false representation as to the person to be arrested. *Evans v. Collins*, 5 Q. B. 805; 12 L. J. Q. B. 339.

Sheriff bound to execute process if defendant described by one of two known names;

The sheriff, it seems, is bound to execute a writ when the defendant is described in the order to arrest by either of two names by which he is known. *Brunskill v. Robertson*, 9 A. & E. 840. He is not, however, bound to execute the writ, or, if he

has executed, to detain a defendant who is described in the order to arrest by a wrong name; *Morgans v. Bridges*, 1 B. & Ald. 647; but if the defendant be described by a wrong name in final process and it corresponds with the judgment, the sheriff is bound to execute it. *Reeves v. Slater*, 7 B. & C. 486. And see as to misnomer, *Kelly v. Lawrence*, 33 L. J. Exch. 197; 3 H. & C. 1; 10 L. T. 195; *Rex v. Sheriff of Middlesex*, 2 Chit. 357; *Crawford v. Satchwell*, 2 Str. 1218; 6th ed. Atk. Sheriff, p. 620. And as to arresting by a wrong name, see *Finch v. Cocken*, 3 D. P. C. 678; 2 C. M. & R. 196; 1 Gale, 130; *Shadgett v. Clipson*, 8 East, 328; *Brunskill v. Robertson*, 9 A. & E. 840; and *Fisher v. Magnay*, 1 D. & L. 40; 12 L. J. C. P. 276; as also *De Mesnil v. Dakin*, L. R. 3 Q. B. 18; 37 L. J. Q. B. 42. See also on this subject, *Money v. Leach*, 1 W. Bl. 563; 3 Burr. 1742.

but not to execute or detain if by wrong name.

As to the sheriff's initial steps in executing a writ of execution, see under titles "Writ of *Fieri Facias*," *ante*, p. 57, and "Appointment of Sheriff and his Officers (Bailiffs, Franchises, &c.)," *ante*, pp. 12, 18. Supplementing the information so given under title "Writ of *Fieri Facias*," a mistake in the warrant will not invalidate the arrest. *Williams v. Lewis*, 1 Chit. 611. A sheriff's warrant on a *capias* filled up by a solicitor after the signing and sealing of the writ is bad. *Burslem v. Fern*, 2 Wils. 47. Indeed in *Hall v. Roche*, 8 T. R. 187, a bailiff bond was ordered to be delivered up where the defendant was arrested before the officer had any warrant and before the writ was delivered to the sheriff; and see *Bell v. Jacobs*, 1 M. & P. 309; 4 Bing. 523. An arrest under a *ca. sa.* by a bailiff to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, even though such officer has engaged him to assist him in his absence, he himself being at a considerable distance at the time of the arrest, is irregular, and the defendant will be discharged out of custody. *Rhodes v. Hull*, 26 L. J. Ex. 265. A warrant to four jointly and not severally will not authorize an arrest by one. *Boyd v. Durand*, 2 Taunt. 161. A sheriff's officer cannot justify an arrest made without a warrant, by procuring a warrant previously issued to another sheriff's officer, but not executed, to be delivered to himself with his name inserted after the arrest. *Collins v. Yewens*, 2 P. & D. 439; 10 A. & E. 570. But a party who has been arrested under colour of a *ca. sa.* and discharged by a judge's order on the ground that the sheriff's officer had no warrant at the time of the taking,

Sheriff's initial steps.

Invalidation of the arrest.

may be arrested again under the same writ. *Plomer v. Bull*, 5 A. & E. 823.

Force to be provided by sheriff.

A sheriff was bound, in executing a *capias* under the repealed provision of 1 & 2 Vict. c. 110, s. 3 [and it is conceived on principle he is still so bound in all cases of arrest], to provide such a force as would enable him to effect a caption in spite of any resistance he had reason to anticipate; *Howden v. Standish*, 6 D. & L. 312; 6 C. B. 504; 18 L. J. C. P. 33; and even the assistance of the military, if necessary to the execution of his warrant, and to prevent personal danger to himself and his ordinary assistants from a mob assembled in extraordinary numbers and with a show of force to overawe the civil power. *Burdett v. Colman*, 14 East, 188. On this subject, Watson on Sheriff (2nd ed.) says, at pp. 236, 237, "A sheriff should take force sufficient to prevent the arrested party from being rescued, as a rescue would make the sheriff liable to an action for an escape." And by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 8, sub-s. 2, "If a sheriff find any resistance in the execution of a writ, he shall take with him the power of the county, and shall go in proper person to do execution, and may arrest the resisters and commit them to prison, and every such resister shall be guilty of a misdemeanor."

Arrest and committal to prison of resisters.

2. Arrest.

Time of Arrest.

Illegality of service of writ on Sunday.

As to the illegality of service of any writ of execution or other process upon the Lord's Day, see under title "*Writ of Fieri Facias*," ante, p. 62. Where a party was arrested on a Sunday and detained until the next morning, and then arrested on process issued out of the Exchequer, it was held that the arrest was void and could not be made good even by a subsequent consent. *Lyford v. Tyrrel*, 1 Anst. 85. Nor can one who is convicted on a penal statute be apprehended on a Sunday for non-payment of the penalty. *R. v. Myers*, 1 T. R. 265. But a party may be taken on an escape warrant on Sunday. *Parker v. Moore*, 2 Salk. 626; and see under "Escape" and "Rescue," post, p. 189. Moreover, where a party has been arrested on a Sunday, a subsequent detainer by another party without collusion is not vitiated by the illegality of the original arrest. *In re Ramsden*, 15 L. J. M. C. 113; and see *Samuel v. Buller*, 1 Ex. 439; 17 L. J. Ex. 54.

Exception as to arrest on escape warrant.

As previously intimated, a writ of execution may be executed at any time of the day on which it is returnable (*Maud v. Barnard*, 2 Burr. 812; *per* Lord Mansfield: "And in the reason of the thing, it is as impossible for the sheriff to bring the defendant into Court before its rising, as before the end of the day of its rising, in all cases where the distance is too great to bring him up within either time: as in the present case, from Rochester, after seven or eight in the evening; which was the time when the process was served"); but if a person is arrested after a writ is returnable, the officer cannot legally detain him (even for the shortest time) till the writ is continued. *Loveridge v. Plastow*, 2 H. Bl. 29. A gaoler is, however, bound to receive a prisoner tendered to him after the return day of the writ wherein he is arrested. *Brandling v. Kent*, 1 T. R. 60.

Writ may be executed at any time of the day returnable;

but not legally afterwards.

Mode of Arrest.

In order to constitute an arrest, the warrant must be produced, but the closest watching of the defendant is not sufficient. *Robins v. Hender*, 3 D. P. C. 543. An arrest must be made by the authority and direction of the bailiff, but it need not be his hand which actually arrests; nor need it take place in his presence and in his sight; nor is there any precise distance from the person arrested, within which he must be at the time. *Blatch v. Archer*, Cowp. 65. No arrest can be effected without actually touching the defendant. *Genner v. Sparks*, 1 Salk. 79, and see *Berry v. Adamson*, 6 B. & C. 528; 2 C. & P. 503; *Russen v. Lucas*, 1 C. & P. 153; R. & M. 26; and *Sandown v. Jarvis*, 28 L. J. Q. B. 156. Placing a party under restraint of a sheriff's officer who holds a *capias* is, however, an arrest without proceeding to actual contact (*Grainger v. Hill*, 4 Bing. N. C. 212; 5 Scott, 561; 7 L. J. (N. S.) C. P. 85); and if the defendant be in the sheriff's custody, as in a locked room, this is considered an arrest. *Williams v. Jones*, Hard. 301. "If the party is already in prison, the sheriff's duty is merely to lodge the order with the keeper or gaoler as a detainer." 6th ed. Atk. Sheriff, 227. The fact of the outer door being open is a condition precedent to the officer's right to enter and arrest the party in his own house. *Kerbey v. Donby*, 1 M. & W. 336; 2 Gale, 31, and *Semayne's case*, Sm. L. C. 9th ed. p. 118. The sheriff may, however, break open the door, if necessary, in the following cases, viz.: (a) a writ of attachment issued against a party to an action for contempt of court. *Harvey v. Harvey*,

Warrant must be produced.

Arrest must be by authority of bailiff.

Actual touching must take place.

When the sheriff and his officers may break open and enter houses. Outer door.

26 Ch. D. 644; 51 L. T. 508. (b) Ejectment. *Semayne's case*, *supra*, p. 177. (c) Crown process, subject to the sheriff's prior notification of the cause of his coming, and request to open the door: *ib.* p. 117; and (d) The house of any one, not being a castle or privilege but for himself, does not extend to protect any person who flies to his house to escape from the ordinary process of law; for the privilege of his house extends only to him and his family, or to those who are lawfully and without fraud and covin there; and, therefore, in such cases after denial on request made the sheriff may break the house. *Ib.* p. 121; and see *Hutchinson v. Birch*, 4 Taunt. 619, and *Johnson v. Leigh*, 1 Marsh. 565; 6 Taunt. 246. A bailiff may, moreover, justify breaking open the door of the house on a fresh pursuit after a prisoner has escaped after an arrest in the street. *Anon.*, Lofft, 390. And if a sheriff's officer peaceably obtain entrance through the outer door, but before he can effect an actual arrest he be forcibly expelled and the outer door fastened against him, and he thereupon, with assistance, force open the outer door and arrest the party, he is justified in so doing, and there is, moreover, under the circumstances, no necessity for any demand of re-entry. *Aga Kurboolie Mahomed v. Reg.*, 3 Moo. P. C. C. 164.

Inner doors.

The owner's privilege of the outer door belongs only to one door and not to others, although belonging to lodgers' separate apartments; and, therefore, a bailiff may break open a lodger's door, having first gained peaceable entrance at the outer door of the house. *Lee v. Gansell*, Lofft, 374; Cowp. 1. Subject to his first demanding admittance, a sheriff's officer, acting under civil process, may justify breaking the inner doors of the defendant's house, though the defendant be not there at the time. *Rateliffe*

Window.

v. Burton, 3 B. & P. 223. The bailiff may also break open the window of the apartment of a person residing in the house of another, having first gained peaceable entrance at the outer door of the house, if such person refuses to open the door of his apartment after being informed by the officer that he has process to serve on him. *Lloyd v. Sandilands*, 2 Moore, 207, and in *Lee v. Gansell*, *supra*.

Hole in wall of unfinished house.

For an instance of an entry through a hole in the outer wall of an unfinished house, see *Whalley v. Williamson*, 7 C. & P. 294; and see as to breaking open doors, *Hopkins v. Nightingale*, 1 Esp. 99. It is no objection that the bailiff gains admittance under false pretences, and any resistance after he is once in will be punishable. *Rex v. Backhouse*, Lofft, 61.

A sheriff's officer is not justified in entering and searching a stranger's house to arrest a defendant under a *ca. sa.*, although such defendant may have resided there immediately before the entry, and although the officer have reasonable cause to suspect that he is in the house, if the fact be that he was not in the house at the time of the entry and search. *Morrish v. Murray*, 13 L. J. Ex. 261; 13 M. & W. 52. After an arrest of a questionable nature in a house, the prisoner surreptitiously got out of the house and was arrested in the high road:—Held, the second arrest was legal. *Snowball v. Dixon*, 10 L. J. Ex. Eq. 56; 4 Y. & C. 511.

Entering and searching stranger's house.

By the Sheriffs Act, 1887, s. 14, “(1) Where an officer being a sheriff, under-sheriff, bailiff, serjeant-at-mace, or other officer whatsoever arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall not:—

Duties of sheriff, &c., on arrest of civil debtors.

- (a) convey such person without his free consent to any house licensed for the sale of intoxicating liquor, or to the private house of such officer or of any tenant or relation of such officer; nor
- (b) charge such person with any sum for, or procure him to call or pay for, any liquor, food, or thing whatsoever, except what he freely asks for; nor
- (c) take such person to any prison within twenty-four hours of the time of his arrest, unless such person refuses to be carried to some safe and convenient dwelling-house of his own nomination, not being the private dwelling-house of such person, and being within the borough or town where such person was arrested, or if he was not arrested within a borough or town then within three miles of the place and in the county or franchise in which he was arrested;

but shall at all times permit such person to send for and to have brought to him at reasonable times in the day any food or liquor from what place he thinks fit, and also to have and use such bedding, linen, and other necessary things as he has occasion for or is supplied with, and shall not purloin or detain the same or require any payment for the use thereof or restrict the use thereof.”

[The imprisonment permitted by sect. 5 of the Debtors Act, 1869, being intended as a punishment for misconduct, it is not an “attachment for debt” within the meaning of the above subsection; and therefore in such a case, the sheriff is not bound to

Exception as to imprisonment under sect. 5 of Debtors Act, 1869.

wait twenty-four hours before taking such a debtor to prison. *Mitchell v. Simpson*, 23 Q. B. D. 373; 58 L. J. Q. B. 425; 25 Q. B. D. 183; and 59 L. J. Q. B. 355.]

Court of
Quarter Ses-
sions may
order allow-
ance for
debtor's
lodging, &c.

“(2) Every Court of Quarter Sessions in a county shall from time to time make an order allowing sums which may be taken from prisoners arrested in such county on any action, writ, or attachment, in respect of one or more night's lodging or for a day's diet or for other expenses of such person, and may from time to time vary such order as seems expedient.

Copy of order
to be fixed in
sessions
house.

“(3) A copy of every such order signed by the clerk of the peace shall be fixed in some conspicuous place in the sessions house or other proper place of the county as the Court may order, so that the same may be there seen and examined as occasion may require.

Copy of this
section to be
delivered to
bailiff or
officer.

“(4) For the purpose of making known the provisions of this section a printed copy thereof shall be delivered by every sheriff, under-sheriff, secondary of the City of London, and other person entrusted with causing the execution of any writ or attachment, to the bailiff, serjeant-at-mace, officer, or other person employed to execute the same.

Copy to be
shown by
bailiff, &c.
to person
arrested.

“(5) It shall be part of the conditions of every security given to any sheriff, or under-sheriff, by any bailiff, serjeant-at-mace, officer, or other person employed to execute any writ or attachment under him that such bailiff, serjeant-at-mace, officer, and other person will show a printed copy of this section to every person whom he arrests and goes with to any house where intoxicating liquor is sold, and also will permit such person or his friend to read over such copy before any liquor or food is called for or brought to him, and any breach by such bailiff, serjeant-at-mace, officer, or person of such condition shall be a misdemeanour in the execution of the writ or attachment, besides being a breach of the conditions of the security.”

By the same Act a similar provision under 32 Geo. 2, c. 28, ss. 1 and 4, is repealed. But the following decisions under such latter Act may be of service in connection with the operation of the above section (14) of the Sheriffs Act, 1887, viz.:—*Pitt v. Sheriff of Middlesex*, 4 M. & P. 726; 1 D. P. C. 201; *Deithirst v. Pearson*, 1 D. P. C. 664; 1 C. & M. 365; *Simpson v. Renton*, 5 B. & Ad. 35; 2 N. & M. 52; *Summers v. Mosely*, 4 Tyr. 158; 2 C. & M. 477; *Silk v. Humphrey*, 4 A. & E. 959; *Barsham v. Bullock*, 10 A. & E. 23; 2 P. & D. 241; and *Gordon v. Laurie*, 9 Q. B. 60; 16 L. J. Q. B. 98.

Where a writ of *ca. sa.* is issued with an indorsement "to be returned *non est inventus*," the meaning is that the sheriff is not to search for the party, but if he renders himself to the sheriff, the latter is bound to arrest and detain him. *Magnay v. Monger*, 4 Q. B. 817; 12 L. J. Q. B. 306. A warrant to arrest the party "to the end that he may become bound, &c. to appear at the next sessions," means the next session after the arrest, and not after the date of the warrant. Accordingly, an officer executing it may justify an arrest after the sessions next ensuing the date of the warrant. *Mayhew v. Parker*, 8 T. R. 110.

Meaning of
indorsements
on writ of
ca. sa.

Place of Arrest.

No arrest can be made in the Queen's presence, nor within the verge of her royal palace, nor in any place where the Queen's justices are actually sitting. The verge of the palace of Westminster extends by 28 Hen. 8, c. 12, from Charing Cross to Westminster Hall. 3 Bl. Com. 289. It seems, however, that the Board of Greencloth may grant leave. *Rex v. Stobbs*, 3 T. R. 735. But an arrest within the verge of the palace is no ground for discharging a defendant out of custody (*Sparks v. Spinks*, 7 Taunt. 311); and a man arrested within the verge of the Court is not entitled to be discharged, an arrest in a franchise being only a breach of the privilege of the lord of the manor. *Kirkpatrick v. Kelly*, 3 Doug. 30. An arrest within the Tower would be bad, but the governor is not privileged as such. See *Batson v. McLean*, 2 Chit. 48, 51; and see also as to an arrest in the Tower Hamlets, *Bell v. Jacobs*, 1 M. & P. 309; 4 Bing. 523. Kensington Palace is privileged as a royal palace against the sheriff's intrusion for the purpose of executing process. *Winter v. Miles*, 10 East, 578; and *Att.-Gen. v. Donaldson*, 10 M. & W. 117. Hampton Court Palace is not, however, so privileged. *Att.-Gen. v. Dakin*, L. R. 4 H. L. 338; 39 L. J. Ex. 113. It is no objection to an arrest that it takes place in a gaol, if the party is there for his own purposes. *Loreitt v. Hill*, 4 D. P. C. 579.

Privileged
places.

2 & 3 Will. 4, c. 39, "An Act for Uniformity of Process in Personal Actions," which provided for service of writs in parts of counties, is repealed by 42 & 43 Vict. c. 59.

2 & 3 Will. 4,
c. 39, repealed
by 42 & 43
Vict. c. 59.

Exemptions from Arrest.

Persons
permanently
privileged.

The following persons are permanently privileged from arrest,
viz. :—

- (1.) Members of the royal family and the Sovereign's household, including chaplains and servants. See as to members of the household, *Reynolds v. Pocock*, 7 D. P. C. 4; 4 M. & W. 371; *Aldridge v. Barry*, 3 D. P. C. 450 n.; *Dyer v. Disney*, 16 L. J. Ex. 183; 16 M. & W. 312; *Sard v. Forrest*, 2 D. & R. 250; 1 B. & C. 189; *Hatton v. Hopkins*, 6 M. & S. 271; *Tapley v. Battine*, 1 D. & R. 79; and *Batson v. Maclean*, 2 Chit. 48. In the last-mentioned case, the Court refused to discharge the major of the Tower on the ground that he was arrested when attending on the Prince Regent, it not appearing that he had been attending by command of his Royal Highness, although the major swore that he could not leave the Tower but on business connected with his official situation. The Court also held, in that case, that the deputy-governor of the Tower is not privileged. As to chaplains, see *Winter v. Dibdin*, 13 L. J. Ex. 263; *Byron v. Dibdin*, 1 C. M. & R. 821; 3 D. P. C. 448; and *Harvey v. Dakins*, 3 Ex. 267; 18 L. J. Ex. 156; and as to servants, see *Bartlett v. Hebbes*, 5 T. R. 686; and *King v. Forster*, 2 Taunt. 167.
- (2.) The Lord Chancellor and the Lord Keeper.
- (3.) Peers, temporal and spiritual, English, Scotch (see as to Scotch peers, *Digby v. Stirling (Lord)*, 8 Bing. 55), and Irish (*Coates v. Hawarden (Lord)*, 7 B. & C. 388. An attachment may, however, issue against a peer for refusing to obey the process of the Court: *Reg. v. St. Asaph (Bishop)*, 1 Wils. 332), peeresses and peers' widows.
- (4.) Bishops, English, Scotch, and Irish, and, it seems, members of Convocation.
- (5.) Members of Parliament for forty days before and forty days after the meeting of Parliament, the rule being the same in the case of a dissolution as in that of a prorogation of Parliament. *Goudy v. Duncombe*, 1 Ex. 430; 17 L. J. Ex. 76; and see as to members of Parliament, *In re Anglo-French Co-operative Society*, 14 Ch. D. 533; 49 L. J. Ch. 388; and *Cassidy v.*

Stewart, 2 Sc. N. R. 432; 3 M. & G. 575; 10 L. J. C. P. 57. But there is no ground for the claim of the privilege of Parliament as an immunity from arrest in respect of an offence of a criminal nature. *In re Gent, Gent-Davis v. Harris*, 40 Ch. D. 190; 58 L. J. Ch. 162; and *Ex parte Lindsay, In re Armstrong*, [1892] 1 Q. B. 327; 65 L. T. 464; 40 W. R. 159; Williams, J.; and on this point, Short and Mellor in their Pract. of the C. O., at p. 394, say, "When orders for payment of money were enforced by attachment, peers and members of the House of Commons were privileged from arrest thereunder, but this exemption did not extend to other contempts, as for instance disobedience to a *subpœna* or the return of a writ of *habeas corpus*, and such persons are still equally liable to arrest on these grounds."

- (6.) Public ministers of foreign states at this Court (but not consuls), ambassadors, and their domestic servants. But the privilege of freedom from arrest of an ambassador's servant is the ambassador's privilege, and not that of the servant; and where a person, alleged to be an ambassador's domestic servant, was arrested, and neither the ambassador, nor anyone on his behalf, interfered, the Court would not discharge the defendant unless he showed a clear case of *bonâ fide* service as a domestic servant of the ambassador. *Fisher v. Begrez*, 2 C. & M. 240.
- (7.) Judges, and their necessary servants, Masters in Chancery, cursitors, ministers, and known clerks of the Court of Chancery.
- (8.) Servants of the Chancellor or Keeper, or of their ministers or officers, of both Houses of Parliament, who are summoned and continually attend there, the serjeant-at-arms, door-keepers, clerks, &c. and the auditors and their officers, corporators or hundredors sued as such.
- (9.) Soldiers of her Majesty's regular forces (except "on account of any debt, damages or sum of money, when the amount exceeds thirty pounds over and above all costs of suit" (44 & 45 Vict. c. 58, s. 144), and seamen or marines of the Royal Navy (except in case of debt contracted before their entering the service; 29 & 30 Vict. c. 109, s. 97).

- (10.) Executors or administrators for the debt of their testator or intestate, unless a *devastavit* writ has been returned or they have made themselves liable for such debts under 29 Car. 2, c. 3, and an heir for a debt to be levied on the land descended.
- (11.) Bankrupts. See under title "Bankruptcy; Arrangements with Creditors and Voluntary Disposition of Property," *post*, p. 354. And see as to exemption from arrest in bankruptcy, *Cobham v. Dalton*, L. R. 10 Ch. 655; 44 L. J. Ch. 702; *Earl of Leves v. Barnett*, 6 Ch. D. 252; 47 L. J. Ch. 144; *In re Ryley, Ex parte The Official Receiver*, 15 Q. B. D. 329; 54 L. J. Q. B. 420; and *In re Manning*, 30 Ch. D. 480; 55 L. J. Ch. 613.

Persons
temporarily
privileged.

The following persons are temporarily privileged from arrest,
viz. :—

- (1.) All persons who have any relation to a cause which calls for their attendance in Court (*Walpole v. Alexander*, 3 Doug. 45; and see *Newton v. Harland*, 8 Sc. 70), civil or criminal, including,
- (a) Arbitrations; as to which see *Spence v. Stuart*, 3 East, 89; *Webb v. Taylor*, 13 L. J. Q. B. 24; 1 D. & L. 676; and *Rishton v. Nisbett*, 1 M. & Rob. 347.
 - (b) Execution of writs by the sheriff.
 - (c) Committees of either House of Parliament.
 - (d) Courts martial.
 - (e) Bankruptcy Court.
 - (f) All inferior Courts of law, such as the sessions, County Courts, &c., and whether persons are compelled to so attend by process or not (*Walpole v. Alexander, ante*), and whether they be parties, solicitors, witnesses, or bail. In other words, any person whose presence is necessary to the administration of the public justice, and on whose will it depends whether he shall or shall not attend, is privileged from arrest in civil process *eundo, morando et redeundo* (*Gilpin v. Benjamin and Cohen*, L. R. 4 Ex. 131; 38 L. J. Ex. 50), including amongst such persons:—
 - (α) barristers and solicitors whilst going to, attending, and returning from Court, or the

judge's chambers, and barristers when on circuit (which is continuous from its commencement to its termination: *The Case of the Sheriff of Oxfordshire*, 2 C. & K. 200) also parliamentary agents, whilst acting for their clients in Court, but not clerks (*Phillips v. Pound*, 7 Ex. 881; 21 L. J. Ex. 277); but a barrister is not privileged from arrest at common law *eundo et redeundo* to and from a court of petty sessions. *Semble*, that the privilege does not extend beyond the case of barristers attending in the Superior Courts and Courts of Nisi Prius (*Newton v. Constable*, 2 Q. B. 157); see as to a solicitor's privilege from arrest, *Att.-Gen. v. The Leather-sellers' Co.*, 7 Beav. 157; *Williams v. Webb*, 12 L. J. C. P. 89; 2 Dowl. N. S. 660; and *Ex parte Watkins*, 1 Jur. 236; as also *In re Hope*, 9 Jur. 856; *Att.-Gen. v. Skimmers' Co.*, 1 Cooper, 1; *Jones v. Marshall*, 26 L. J. C. P. 229; 3 Jur. N. S. 916; *In re Freston*, 11 Q. B. D. 545; 52 L. J. Q. B. 545; and *Thomson v. Moore*, 1 Dowl. N. S. 283. (f) Bankrupts, as to whose privilege see under title "Bankruptcy, &c.," *post*, p. 354, as also *Ex parte Jackson*, 15 Ves. 116; *Ex parte Britten*, 1 M. D. & D. 278; *Chauvin v. Alexander*, 31 L. J. Q. B. 79; 10 W. R. 248; *Lloyd v. Harrison*, 34 L. J. Q. B. 97; and *In re Poland*, L. R. 1 Ch. 356; 35 L. J. Bank. 19. (g) A person accused of a criminal charge, when out on bail on remand, as well as the prosecutor and witnesses. *Gilpin v. Benjamin and Cohen*, *ante*. (δ) Bail, when attending to justify. *Rimmer v. Green*, 1 M. & S. 638. (ε) Magistrates attending petty sessions or police courts in the discharge of their duty. *Glendenning v. Browne*, 3 Ir. C. L. R. 115; *Dubois v. Wyse*, 5 Ir. C. L. R. 303. And see as to temporary privilege from arrest of persons connected with and attending judicial proceedings, *Perisse v. Perisse*, 5 H. L. Cas. 671; and *Hoborn v. Fowler*, *Ex parte Hoborn*, 62 L. J. Q. B. 49.

- (2.) Clergymen or other ministers engaged, or knowingly about to engage, in any of the rites or duties of celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in the lawful burial of the dead in any churchyard or other burial place, or who shall be knowingly going to perform the same or returning from the performance thereof. 24 & 25 Vict. c. 100, s. 36; and see *Goddard v. Harris*, 7 Bing. 320.
- (3.) Coroners or deputy coroners whilst engaged in executing their office.

Non-exemptions from Arrest.

Aliens.

Aliens are not exempt from arrest, as to which see *De la Vega v. Vianna*, 1 B. & Ad. 284, and *Imlay v. Ellefsen*, 2 East, 453.

Infants.

"An infant should not have been held to bail for any debt or other matter where the plea of infancy would have been a legal bar to the action. If held to bail, however, a Court or a judge, it seems, would not discharge him." 14th ed. Chit. Arch. p. 1460.

Married women.

Married women, it appears, are subject to arrest; as also are insane persons. *Kernot v. Norman*, 2 T. R. 390; *Nutt v. Verney*, 4 T. R. 121; and *Steel v. Alan*, 2 B. & P. 362.

Insane persons.

Person tried, acquitted and discharged from criminal charge.

A party who has been detained upon a criminal charge, and tried, acquitted, and discharged, is not privileged from arrest during his return home from the gaol in which he has been confined. *Goodwin v. Lordon*, 1 A. & E. 378; 3 N. & M. 879; and see *Hare v. Hyde*, 16 Q. B. 394; 20 L. J. Q. B. 185. Moreover, a defendant when discharged from legal custody, has no privilege from arrest when returning home. *Anon.*, 1 D. P. C. 157. The privilege from arrest under civil process is entire, *eundo, morando et redeundo*; accordingly if a party cannot claim his privilege, *eundo et morando*, he will not be entitled to it *redeundo*. *Ex parte Cobbett*, 7 El. & Bl. 955; 26 L. J. Q. B. 293; and see *Montagu v. Harrison*, 3 C. B. N. S. 292; 27 L. J. C. P. 24. A voluntary prosecutor—as a common informer—is not entitled to any privilege from arrest. *Ex parte Cobbett, supra*. Candidates at a parliamentary election, or voters for such candidates, are not privileged from arrest. According to Chit. Arch., it is apprehended that a judge in his discretion will in general allow a defendant to be arrested, although he

Voluntary prosecutor.

Parliamentary candidates and voters.

Person arrested before on same cause.

has been before arrested for the same cause of action, unless the proceeding is vexatious and oppressive; and see *Heywood v. Collinge*, 9 A. & E. 268. As to the non-exemption from arrest of bankrupts, see the Bankruptcy Act, 1883, s. 30, sub-s. 1 and 4, under title "Bankruptcy," &c., *post*, p. 355. Bankrupts.

The Sheriff's Relative Position in Case of Privilege.

It seems that in some cases of permanent privilege the sheriff would incur a fine, imprisonment, and even corporal punishment by arresting the privileged party, *e. g.*, a peer, peeress, or a member of the House of Commons, an ambassador or his domestic (subject to the proper registration of the name of the latter at the Foreign Office and its transmission to the sheriffs of London and Middlesex), and a clergyman whilst privileged to the knowledge of the sheriff. On this subject, Chit. Arch. (14th ed.) says, at p. 1484, "Except where a party is privileged from arrest by the Queen's writ of protection, the sheriff is not bound to notice a party's temporary privilege from arrest. No action lies against a sheriff for arresting a party whilst temporarily privileged from arrest. Nor does an action lie against a sheriff for arresting a person after notice that he was privileged *redeundo* from attending as a witness before a court of competent jurisdiction. . . . A sheriff is not bound to arrest a party privileged from arrest (as a witness returning from the Court). Unless the party privileged claims his privilege, he is in legal custody, and the sheriff is bound to detain him. If a party is improperly arrested whilst privileged from arrest, he may obtain his discharge upon application to the Court or a judge at Chambers." It seems that the sheriff is excused, and is not liable in damages if, in acting under a mandate of the Court, he has arrested a privileged person (*Tarlton v. Fisher*, 2 Doug. 676); and he is not liable in trespass if the writ is set aside, although the party who has sued out the writ may be. Unless the party be privileged, the sheriff is liable for the costs of an illegal arrest. Liability for arresting privileged persons in certain cases. Not liable in other cases of privilege. Liability for costs of illegal arrest.

Liability of Third Parties for Obstructing Arrest.

On this subject, see under "Introductory," *ante*, p. 155, and under "Initial Steps," *ante*, p. 176.

3. Escape and Rescue.

An escape, if
arrest and
custody
lawful.

Escape in general is where any person who is under lawful arrest and restrained of his liberty, either violently or privily evades such arrest and restraint, or is suffered to go at large before being delivered by due course of law. It seems agreed as a general rule that wherever a sheriff or other officer has a person in custody by authority from a Court which has jurisdiction over the matter, the suffering such person to go at large is an escape, for he cannot judge of the validity of the process, or other proceedings of such Court, and therefore cannot take advantage of any errors in them. Hence the law allows him, in an action of false imprisonment, to plead such authority which will excuse him, even though it be erroneous. 7th ed., Bac. Abr. Vol. III. p. 122. If the sheriff permits a prisoner in execution to go at large, though he afterwards return, yet it is an escape. *Boyton's Case*, 3 Rep. 44. And it is also an escape if the bailiff remove a prisoner taken in execution to the county gaol, situate out of his bailiwick, and there deliver him to the sheriff (*Boothman v. Surrey (Earl of)*, 2 T. R. 5), or if the sheriff's officer, having taken a prisoner in execution, permit him to go about with a follower of his before he takes him to prison. *Benton v. Sutton*, 1 B. & P. 24. Where the sheriff suffers the defendant to escape either with the consent or by the fraud of the plaintiff, it is no escape as against him; but the consent must be given previous to the discharge in order to excuse the sheriff, and an assent subsequent will not make it an escape with the consent of the plaintiff and therefore the sheriff will not be excused; but the plaintiff either has his remedy against the sheriff or may retake the party. 7th ed., Bac. Abr. Vol. III. p. 139; *Hiscocks v. Jones*, M. & M. 269; *Scott v. Peacock*, 1 Salk. 271. If upon execution of a writ of *ca. sa.*, the sheriff before the return day receive the money due from a prisoner and thereupon liberate him, before he has paid it over in satisfaction to the party entitled to it, he is answerable for an escape. *Slackford v. Austen*, 14 East, 468. Moreover, the fact of the sheriff unauthorizedly taking bail or receiving payment constitutes an escape. His responsibility ceases as soon as he has conveyed the arrested person to prison.

If sheriff
receives sums
due before
return;

or bail.

No escape,
if custody
not lawful.

If a party not in lawful custody escapes, it is no escape in law and consequently the officer is not punishable for suffering

a person so taken to escape, and in an action against him for the escape the law allows him to plead that his authority was void, which will excuse him. 7th ed., Bac. Abr. Vol. III., p. 123.

The sheriff is not, however, liable for an escape from the special bailiff of the party at whose instance the arrest is made. *Doe v. Trye*, 7 Sc. 704; 7 D. P. C. 636; *Pascoe v. Vyrian*, 1 Dowl. N. S. 939.

Sheriff not liable for escape from plaintiff's special bailiff.

It was held in *Pitcher v. Bailey*, 8 East, 171, upon the authority of the therein cited case of *Eyles v. Falkney*, that where an officer is guilty of a breach of duty in permitting a prisoner to go at large on his promise to pay the debt, for which he was arrested, to the creditor, resulting in his being obliged to pay the creditor himself, he could not recover back the money from the debtor.

When escape allowed, officer cannot recover money paid from debtor.

After a voluntary escape the sheriff cannot retake a prisoner (*Atkinson v. Jameson*, 5 T. R. 25) and would be liable to an action for false imprisonment if he did, in the case of an escape with his or his officer's consent, and if the sheriff by mistake releases a defendant against whom a *ca. sa.* has been lodged it is a voluntary escape. *Filewood v. Clement*, 6 D. P. C. 508. Moreover, according to the last-cited case, if the sheriff does retake the defendant, the caption being a nullity, lapse of time will not be an objection to the defendant's discharge. But it seems that under certain circumstances the arrested party may be retaken on escape as, *e. g.*, in case of a negligent escape in *ca. sa.* without the sheriff or his officer's collusion, they may retake the party in any place and even on Sunday. The sheriff is, moreover, excused if he retake the party after a negligent escape or if the latter return into custody before any proceedings are commenced against the sheriff or if the party be, before any such proceedings, prevented doing so by the action of the plaintiff with the object of fixing the sheriff with consequent liability, subject, however, to the sheriff being either unaware of the escape or knowing of it, having done his utmost to retake the party.

Retaking on escape.

As to rescue, the sheriff is bound to provide such a force as will enable him to effect his caption in spite of any resistance he has reason to anticipate; and if, after a caption, the party taken be rescued by force, the sheriff may return the rescue. *Howden v. Standish*, 6 C. B. 504; 18 L. J. C. P. 33; and see judgment of Coltman, J., in that case.

Rescue.

4. Bail.

May be taken
under attach-
ment.

Cannot be
taken under
ca. sa.

May be taken
under attach-
ment for the
peace.

When a defendant is taken under attachment, which is in the nature of mesne process, the sheriff may, it appears, take bail but he is not bound to do so; if he does, he may recover upon the bail bond, and if he has the party in custody at the return of the writ, no action will lie against him. *Lewis v. Morland*, 2 B. & Ald. 56; but see *Anon.*, 1 Stra. 479. It seems, however, according to *Lewis v. Morland*, *supra*, at p. 65, that bail cannot be taken under a writ of *ca. sa.*

It will be observed that in the case of attachment on articles of the peace (Writ of Attachment for the Peace) the sheriff may discharge the party on bail in accordance with the directions of the writ.

Form of Bail Bond under Attachment for the Peace.

Know all men by these presents that we [*name and description of the party arrested*] and and are held and firmly bound to Esquire, sheriff of the county of in the penal sum of £ of good and lawful money of Great Britain to be paid to the said sheriff, for which payment to be well and faithfully made we bind ourselves and every one of us by himself for the whole and every part thereof, the heirs executors and administrators of us and every of us firmly by these presents sealed with our seals, dated this day of 18 . Whereas the above bounden [*party arrested*] was on the day of 18 taken by the said sheriff in the bailiwick of the said sheriff by virtue of the Queen's Writ of Attachment for the Peace issued out of Her Majesty's Court of at bearing date the day of 18 to the said sheriff directed and delivered. And whereas the said sheriff is by the said writ directed on his attaching the said [*party arrested*] by virtue thereof to discharge the said [*party arrested*] on bail until the day of 18 the day named in such writ for the said [*party arrested*]'s attendance before the said Court, by sufficient manucaptors under a certain penalty to be imposed upon them by the said sheriff as well for the keeping his the said [*party arrested*]'s day as for the keeping the peace by him in the meantime of Our Lady the Queen and all her liege people and especially towards of named in such writ. Now the condition of this bond is such that if the above bounden [*party arrested*] so keeps his day and so keeps the peace during such interval as aforesaid as required by the said writ, then this present obligation to be void or else to stand in full force and virtue.

Signed sealed and delivered &c.

(L.S.)
(L.S.)
(L.S.)

5. Security.

As to arrest of defendant under section 6 of the Debtors Act, 1869, "the security to be given by the defendant may be a deposit in Court of the amount mentioned in the order, or a bond to the plaintiff by the defendant and two sufficient sureties (or with the leave of the Court or a judge either one surety or more than two), or, with the plaintiff's consent, any other form of security. The plaintiff may, within four days after receiving particulars of the names and addresses of the proposed sureties, give notice that he objects thereto, stating in the notice the particulars of his objections. In such case the sufficiency of the security shall be determined by a master, who shall have power to award costs to either party. It shall be the duty of the plaintiff to obtain an appointment for that purpose, and unless he do so within four days after giving notice of objection, the security shall be deemed sufficient." R. of S. C., 1883, Ord. LXIX., r. 3.

To be given
by defendant.

"The money deposited, and the security, and all proceedings thereon, shall be subject to the order and control of the Court or a judge." *Ib.* r. 4.

Control of
Court over
security, &c.

"Upon payment into Court of the amount mentioned in the order, a receipt shall be given; and upon receiving the bond or other security, a certificate to that effect shall be given, signed or attested by the plaintiff's solicitor if he have one, or by the plaintiff, if he sue in person. The delivery of such receipt, or a certificate to the sheriff or other officer executing the order, shall entitle the defendant to be discharged out of custody." *Ib.* r. 6.

Discharge of
defendant on
payment or
security.

In the case of the writ of *ne exeat regno*, it will be remembered that it is granted to prevent a person from leaving the realm, to the damage of the person to whom he is indebted, until he has given security for the amount of the debt; as to which see, moreover, directions in the writ, *ante*, p. 165.

In case of
ne exeat regno.

As to security in the case of Articles of the Peace, see C. O. R. 1886, rr. 280—292 (Articles of the Peace), *ante*, p. 45.

In case of
Articles of
the Peace.

6. Discharge.

In case of arrest on mesne process a plaintiff was bound to accept from a defendant in custody under a *ca. sa.* the debt and costs, when tendered, in satisfaction of his debt, and to sign

In arrest on
mesne process
plaintiff
bound to
accept debt

and costs from defendant.

Discharge of prisoner by authority of attorney in the cause.

an authority to the sheriff to discharge the defendant out of custody. *Crozer v. Pilling*, 6 D. & R. 129; 4 B. & C. 26; and see *Hemming v. Hale*, 29 L. J. C. P. 137, where a payment to a solicitor's clerk was held good. Again, by 15 & 16 Viet. c. 76 (Common Law Procedure Act, 1852), sect. 126, a written order under the hand of the attorney in the cause, by whom any writ of *capias ad satisfaciendum* should have been issued, justified the sheriff, gaoler, or person in whose custody the party might be under such writ, in discharging such party, unless the party for whom such attorney professed to act should have given written notice to the contrary to the sheriff, gaoler, or person in whose custody the opposite party might be, but such discharge was not to be a satisfaction of the debt, unless made by the authority of the creditor; and nothing contained in such act should justify any attorney in giving such order for discharge without the consent of his client. Nor had the plaintiff's solicitor any authority over the execution of the writ of *ca. sa.* so as to carry it into effect against the order of the plaintiff. *Barker v. St. Quintin*, 1 D. & L. 542; 13 L. J. Ex. 144; and see *Martin v. Francis*, 2 B. & A. 402; 1 Chit. 241.

Discharge on authority of plaintiff, provided there are no detainers.

The sheriff was, moreover, bound to discharge the defendant on the plaintiff authorizing it, and providing there were no detainers against defendant (2nd ed. Watson Sheriff 197), to ascertain which the sheriff might detain the party a reasonable time, at least twenty-four hours, and the officer was not bound to make the search until the written discharge arrived. *Taylor v. Brander*, 1 Esp. 45; and see *Samuel v. Buller*, 1 Ex. 439; 17 L. J. Ex. 54, where it was, moreover, held that service on a Sunday of a warrant of detainer under a *ca. sa.* made no difference in the case. And where the debt had been paid, no matter by whom, the defendant was entitled to be discharged. *Rimmer v. Turner*, 3 D. P. C. 601. In an action against a sheriff for wrongfully discharging the judgment debtor, the gist not being mere negligence as in an action for an escape, it is doubtful whether it is a defence that the plaintiff's negligence contributed to the injury by his sending an order which the sheriff might have understood as authorizing the discharge and, *semble*, that the defence must be that the plaintiff authorized the discharge and that it must be specially pleaded. *Hodges v. Patterson*, 26 L. J. Ex. 223. To continue, if the sheriff, after a direction from a plaintiff not to execute a writ of *ca. sa.* did so, he (the sheriff) became a trespasser, as also if he detained a

defendant after notice from the plaintiff that he had released him from the debt. *Barker v. St. Quintin*, 1 D. & L. 542; 13 L. J. Ex. 144. But where a *ca. sa.* was countermanded before any arrest thereunder, the defendant's arrest under other parties' writs did not make him in custody under the first writ. *National Assurance Co. v. Best*, 2 H. & N. 605; 27 L. J. Ex. 19; and see as to countermanding arrest, *Seuple v. Keen*, 3 H. & N. 753; 28 L. J. Ex. 151; and *Fletcher v. Hinder*, 28 L. J. Ex. 28; 3 H. & N. 757.

Failing above authority, the defendant could only be discharged under an order of the Court; *In re Thompson, Nally v. Aylett*, 43 L. J. Ch. 721; 30 L. T. 783; see also *Re Deere*, 10 L. R. Ch. 658; in connection with which subject see the following cases, viz.:—*re* misdescription of defendant and other irregularities in writ, *Macdonald v. Mortlock*, 14 L. J. Q. B. 244; 2 D. & L. 963; *Reg. v. Burgess*, 2 Jur. 396; *R. v. Culvert*, 2 C. & M. 189; 4 Tyr. 77; *Rennie v. Bruce*, 14 L. J. Q. B. 207; 2 D. & L. 946; *Moore v. Magan*, 16 L. J. Ex. 57; *Bettyes v. Thompson*, 7 D. P. C. 322; 2 Jur. 920; and *Strong v. Dickinson*, 5 D. P. C. 99; *re* privilege, *Flight v. Cook*, 13 L. J. Q. B. 78; 1 D. & L. 174; *re* plaintiff's death, *Parkinson v. Horlock*, 2 N. R. 240; *Ellis v. Griffith*, 16 L. J. Ex. 66; 16 M. & W. 106; 4 D. & L. 279; *Todd v. Wright*, 16 L. J. Q. B. 311; *Gore v. Wright*, 1 Dowl. N. S. 864; *Broughton v. Martin*, 1 B. & P. 176; *Dunsford v. Gouldsmith*, 8 Moore, 145; *Taylor v. Burgess*, 4 D. & L. 708; 16 L. J. Ex. 204; *Camp v. Pole*, 7 D. & L. 289; 8 C. B. 375; *Cox v. Pritchard*, 2 L. M. & P. 298; *re* Crown process, *Reg. v. Renton*, 2 Ex. 216; 17 L. J. Ex. 264; and *re* irregular arrest, *Birch v. Prodger*, 1 N. R. 135; and *Rhodes v. Hull*, 26 L. J. Ex. 265. If the sheriff detain a person after he has had notice of an order of the Court to discharge such person from arrest, it seems he is liable to an action. *Magnay v. Burt*, 5 Q. B. 381; and *Martin v. Francis*, 1 Chit. 241; although see *Watson v. Carroll*, 7 D. P. C. 217.

If while a *ca. sa.* was lying in the hands of a sheriff the party was illegally taken into custody at the suit of another person, the *ca. sa.* attached and the sheriff could not discharge the defendant. *Arundel v. Chitty*, 1 D. P. C. 499. In cases of arrest on mesne process, the sheriff was not liable for the consequences of his bailiff's negligence in not paying over to the plaintiff the amount received by him from the debtor. In other

Discharge under order of Court.

Misdescription of name and other irregularities.

Privilege.

Plaintiff's death.

Irregular arrest.

Sheriff not liable for bailiff's negligence in not paying over.

Effect of
discharge.

words, it was no part of the sheriff's duty in the execution of a *ca. sa.* to receive the amount in question in order to its payment over to the execution creditor, although the judgment was not satisfied till such payment. *Wood v. Finnis*, 7 Ex. 363; and see *Woodman v. Gist*, 8 C. & P. 213. Again, a discharge from custody by plaintiff's solicitor was no discharge of the debt. *National Assurance Co. v. Best*, 27 L. J. Ex. 19; 2 H. & N. 605. Accordingly if upon the execution of a writ of *ca. sa.* the sheriff before the return day received the amount due from the prisoner and thereupon liberated him before he had paid it over in satisfaction to the party entitled thereto, the sheriff was answerable as for an escape. *Slackford v. Austen*, 14 East, 468; and see *Hemming v. Hale*, 29 L. J. C. P. 137; and *Semple v. Keen*, 2 H. & N. 753; 28 L. J. Ex. 151. It seems the sheriff is not the proper party to sue, and cannot be called upon to pay into Court money paid to him under an attachment. *Rex v. Palmer*, 2 East, 411; *Rex v. Sheriff of Devon*, 3 D. P. C. 10. But he is not entitled to his poundage on the sum levied. *Rex v. Sheriff of Devon*, *ante*.

Application
of principles
to committal
under Debtors
Act.

It is conceived that the above principles are still more or less in force in relation to the cases where a writ of *ca. sa.* is still applicable and to orders of committal under sect. 5 of the Debtors Act, 1869; it being, it will be observed, provided by sub-sect. 2 of that section that every order of committal by any superior Court shall, subject to the prescribed rules, be (*inter alia*) obeyed and executed in the like manner as a writ of *capias ad satisfaciendum*. Moreover, in regard to committal under the Debtors Act, 1869, any person imprisoned thereunder shall be discharged out of custody upon a certificate signed in the prescribed manner to the effect that he has satisfied the debt or instalment of a debt in respect of which he was imprisoned together with the prescribed costs (if any); whilst, by the general rules under the same Act, r. 5, upon payment of the sum or sums mentioned in the order (including the sheriff's fees in like manner as upon a *ca. sa.*) the debtor shall be entitled to a certificate in the Form B. in the schedule, or to the like effect, signed by the attorney in the cause of the creditor, or signed by the creditor and attested by an attorney on his behalf, or a justice of the peace.

Discharge
under orders
of arrest
under Debtors
Act.

As to discharge under orders of arrest under sect. 6 of the Debtors Act, 1869, see under sub-title "Security," *ante*, p. 191, as also *Hume v. Drayff*, L. R. 8 Ex. 214; 42 L. J. Ex. 145.

As to discharge in the case of attachment for not answering to an information, see Short & Mellor's Pract. of the C. O., pp. 411, 412.

In case of attachment for not answering to information.

And see as to discharge, under sub-title "Escape and Rescue," *ante*, p. 188.

As to the writ of *contumace capiendo*, after authorizing and requiring all sheriffs, gaolers and other officers to execute the same by taking and detaining the body of the person against whom such writ is directed to be executed, 53 Geo. 3, c. 127, s. 1, proceeds thus: "And upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the Court, the judges or judge of such Ecclesiastical Court shall pronounce such party absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff, gaoler or other officer in whose custody he shall be, in the form to this Act annexed, for discharging such party out of custody, and such sheriff, gaoler or other officer shall, on the said order being shown to him, so soon as such party shall have discharged the costs lawfully incurred by reason of such custody and contempt forthwith discharge him."

In case of writ of *contumace capiendo*.

Writ of Deliverance referred to.

Whereas of in your county of whom lately, at the denouncing of for contumacy, and by writ issued thereupon, you attached by his body until he should have made satisfaction for the contempt; Now he having submitted himself, and satisfied the said contempt. We hereby empower and command you, that without delay you cause the said to be delivered out of the prison in which he is so detained, if upon that occasion and no other he shall be detained therein. Given under the seal of our of

A. B., Registrar

[or, Deputy Registrar, as the case may be].

Extracted by E. F.,
Proctor.

By 3 & 4 Vict. c. 93, s. 1, the Privy Council or the judge of any Ecclesiastical Court may order the discharge of persons in custody under this writ; and see as to discharge under this writ, *Ree v. Dwyer*, 1 D. & R. 460; 5 B. & A. 791; *Ree v. Maby*, 3 D. & R. 570; *Reg. v. Jones*, 10 A. & E. 576; *Ree v. Jenkins*, 3 D. & R. 41; *S. C., nom. Ex parte Jenkins*, 1 B. & C. 655; *Reg. v. Baines*, 4 P. & D. 362; 12 A. & E.

210; 5 Jur. 337; *In re The Rev. S. P. Dale, The Queen v. Lord Penzance*; *In re The Rev. R. W. Enraght, The Queen v. Lord Penzance*, 6 Q. B. D. 376; 50 L. J. Q. B. 234.

Discharge in
bankruptcy.

As to discharge in bankruptcy, see under title "Bankruptcy, &c.," *post*, p. 354.

As to discharge generally, see *Greaves v. Keen*, 4 Ex. D. 73; 40 L. T. 216; *In re Edcards, Brooks v. Edwards*, 21 Ch. D. 230; and *Pitt v. Coombs*, 3 N. & M. 212; 5 B. & Ad. 1078.

7. Re-arrest and Detention.

A *ca. sa.* is not returnable till executed; and therefore where a party arrested under a *ca. sa.* is discharged on the ground of privilege the writ is not executed, and he may be retaken under it when his privilege expires. *Reynolds, Barrack, or Williams v. Newton*, 1 G. & D. 153; 1 Q. B. 525; and see *Phillips v. Price*, 12 L. J. Q. B. 348, and *Plomer v. Bull*, 5 A. & E. 823. Moreover, where a defendant taken in execution obtains a discharge by reason of the irregularity of a *ca. sa.* he may be retaken under a fresh writ. *Collins v. Beaumont*, 10 A. & E. 225; 2 P. & D. 363. *Quere*, whether a defendant can be arrested a second time without a judge's order where the writ upon which he was first arrested has been set aside for irregularity. *Holliday v. Lawes*, 6 L. J. (N. S.) C. P. 101; 3 Bing. N. C. 541. But, according to 14th ed. Chit. Arch. p. 1488, if the defendant be entitled to his discharge, the same plaintiff cannot while he is in custody, or while he is returning from custody and until he completely regain his liberty, detain or arrest him, though for a totally different cause of action, but, if the defendant delay going out of custody, it seems he might be arrested.

A party cannot be detained, but may be retaken under an amended writ of attachment. *Reg. v. Burgess*, 2 Jur. 396.

Since the Debtors Act, 1869, a person attached for misconduct and who has cleared his contempt cannot be detained for not paying the costs. *Jackson v. Mauby*, 1 Ch. D. 86; 45 L. J. Ch. 53; *Micklethwaite v. Fletcher*, 27 W. R. 793.

And see also as to retaking in relation to escape, *ante*, p. 189, and as to detention, under sub-title "Several Writs," *post*, p. 197.

8. Several Writs.

Issue of
several writs.

Several writs of attachment may, it seems, concurrently issue into different counties, but as soon as the defendant has been arrested on one, the other writs should be countermanded.

In the case of a return of "*non est inventus*" on any writ of attachment for contempt, one or more writs may issue on the return day of the previous writ. C. O. R. 1886, r. 262. And on a return of "*non est inventus*" in the case of articles of the peace the subsequent proceedings shall be the same as provided by the rules on attachment for contempt up to capture. C. O. R. 1886, r. 284. As to duration and renewal of writs, see C. O. R. 1886, r. 226, *ante*, p. 39.

Alias and
pluries writs.

Duration and
renewal.

Concurrent orders of committal under sect. 5 of the Debtors Act, 1869, may be issued for execution in different counties. Reg. Gen. M. T. 1869. Concurrent orders to arrest under sect. 6 of that Act may also be issued for arrest in different counties. R. of S. C. 1883, Ord LXIX. r. 2.

Concurrent
orders for
committal or
arrest under
Debtors Act.

When a sheriff arrests a defendant in one proceeding, it operates virtually in all other proceedings in which the sheriff holds writs against him at the time. *Collins v. Fewens*, 2 P. & D. 439; 10 A. & E. 570; and *Watson v. Carroll*, 7 D. P. C. 217. In *Wright v. Stanford*, 1 Dowl. N. S. 272; 6 Jur. 130, it was held that where a defendant had been regularly arrested on an attachment out of Chancery, the fact of an irregular *ca. sa.* out of the Common Pleas against the defendant after the arrest did not interfere with the right of another plaintiff to detain the defendant by virtue of a subsequent *ca. sa.* And see *Frost's Case*, 5 Rep. 89. If the sheriff, having two writs in his hands, one valid, the other invalid, arrests on both at the same time, he may rely on the valid writ and treat as detainers any number of valid writs which he may then have or which may afterwards come to his hands. But if, having two such writs, he arrests on the invalid writ alone, he cannot afterwards justify the arrest by the good writ. Moreover, the sheriff cannot, while a person is unlawfully in his custody by virtue of an arrest on an invalid writ, arrest that person on a good writ; to permit him to do so, would be to allow him to take advantage of his own wrong. *Hooper v. Lane*, 10 Q. B. 546; 17 L. J. Q. B. 189; and see *Bateman v. Freston*, 30 L. J. Q. B. 133. But where a sheriff illegally arrested a defendant in one action, it was held he could not justify detaining him in another. *Barratt v. Price*, 2 L. J. (N. S.) C. P. 56; 9 Bing. 566; 1 D. P. C. 725. Moreover, if the first arrest is illegal, the party cannot be detained under other writs without a fresh arrest, which fresh arrest is not, however, prevented by the custody under the former illegal writ in the absence of collusion. *Collins v. Fewens*, 2 P. & D.

Arrest under
several writs.

When ori-
ginal arrest
legal.

When ori-
ginal arrest
illegal.

439; 10 A. & E. 570. In *Howard v. Cauty*, 13 L. J. Q. B. 294, the sheriff, by the direction of the plaintiff's solicitors, issued a warrant under a *ca. sa.* to his officer to whom notice was afterwards given by such solicitors not to execute the writ. It, however, remained in the sheriff's hands, and the defendant was subsequently arrested by the same officer at a third person's suit. Held, that the defendant could not, under these circumstances, insist that he had ever been in custody under the first writ, although *quære* whether notice to a sheriff's officer intrusted with a warrant not to execute a writ is notice to the sheriff.

In *Robinson v. Yewens*, 5 M. & W. 149; 3 Jur. 776, a person, against whom several writs of *capias* had been lodged with the sheriff, was arrested on one of them by an officer who had no warrant for that purpose, but who, after the arrest, had his name inserted in a warrant which had been placed in the hands of another officer to make the arrest in that action. Held, that such person was thenceforth lawfully in custody on all the writs, the under-sheriff having negatived by affidavit that at the time of altering the warrant he knew of any arrest having been made, or that he was acting in collusion with the officer. But see *Collins v. Yewens*, 10 A. & E. 570; 2 P. & D. 439; and *Pearson v. Yewens*, 7 Scott, 435; 5 Bing. N. C. 489.

And on the subject of "Several Writs," see under title "Writ of *Fieri Facias* (Introductory)," *ante*, p. 52.

Return of Writs.

Return
generally.

As to return of writs generally, see under title "Writ of *Fi. Fa.*," *ante*, p. 87, under sub-heading "Introductory" of this Chapter, and under title "Liability and Rights of the Sheriff and Remedies against the Sheriff," *post*, p. 494, whilst as to what returns should be made in the various branches of arrest process, see the following forms.

Return to
capias.

To refer more particularly to return in arrest process, (a) as to return in case of *capias*, the sheriff is bound to make his return to this writ within a reasonable time. *Brown v. Jarvis*, 5 D. P. C. 281; 1 M. & W. 704; 5 L. J. (N. S.) Ex. 271.

Return to
*contumace
capiendo*.

(b) As to the return to *contumace capiendo*, by sect. 1 of 5 Eliz. c. 23 (incorporated with 53 Geo. 3, c. 127), this writ shall be issued in term time and returnable in the ensuing term, and

there must be at least twenty days between the *teste* and return; but it seems it may now be issued and made returnable irrespective of term. The proceedings will be irregular unless the writ be lodged for execution previous to the return day. Any required return to the writ of *contumace capiendo* should be made immediately on its execution; the return must be to the Crown Office, all further proceedings taking place on the Crown side of the Court. (c) As to return in case of *habeas corpus*, it is provided by 31 Car. 2, c. 2, s. 2, that the sheriff, or other officer, having any person in his custody must within three days after service of *habeas corpus* (with the exception of treason and felony), as and under the regulations therein mentioned, make return of such writ, or bring up the body before the Court to which the writ is returnable and certify the true causes of imprisonment, "unless the commitment of the said party be in any place beyond the distance of twenty miles from the place or places where such Court or person is or shall be residing, and if beyond the distance of twenty miles, and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days, after such delivery aforesaid, and not longer"; and by sect. 3, a person committed, except for treason and felony, &c., may appeal to the Court, who may award *habeas corpus* "to be directed to the officer or officers in whose custody the party so committed or detained shall be, returnable *immediate*" before the Court, and upon service thereof such officer, &c., must bring up the prisoner before the Court "within the times respectively before limited," with the return of such writ and the true causes of the commitment and detainer; and thereupon within two days the Court may discharge the prisoner upon recognizance, and certify the writ with the return and recognizance, subject to the therein-mentioned proviso for process not bailable (f). And see hereon *Ex parte Sheriff of Middlesex*, 9 D. P. C. 195. The return to a *habeas corpus* must answer the taking as well as the detaining. *Warman's Case*, 2 W. Bl. 1204; and see as to return in *habeas corpus*, C. O. R. 1886, rr. 241—245, and for any further information, Short & Mellor's Pract. of the C. O., Chap. XI., "*Habeas corpus*." (d) As to return to attachment for contempt, see C. O. R. 1886, r. 262; and (e) as to articles of the peace, see C. O. R. 1886, rr. 282, 283.

Return to
habeas corpus.

Returns to
attachment
for contempt
and articles of
the peace.

(f) For greater simplicity the old mode of spelling in the text is not here adopted.

- Returns: A return to a writ of *capias*, "the defendant is not to be found in my bailiwick," is a void return. *Rex v. Kent (Sheriff)*, in a cause of *Potter v. Simpson*, 2 M. & W. 316; 5 D. P. C. 451. And if a sheriff returns "*non est inventus*" when the defendant is visible and pursuing his business as usual, the sheriff is liable to an action for false return. *Beckford v. Wilts (Sheriff)*, 2 Esp. 475; but see *Saxton v. West*, 2 Anst. 479. If after a
- Rescue. caption the party taken be rescued by force, the sheriff may return the rescue. *Howden v. Standish*, 6 C. B. 504; 18 L. J. C. P. 33. And where a defendant has been rescued from a bailiff, the sheriff may return the rescue as from his bailiff, and not from himself. *Gobbey v. Dewes*, 3 M. & Scott, 556; 2 L. J. (N. S.) C. P. 226; and see as to return of rescue, *Rex v. Middlesex (Sheriff)*, 1 B. & A. 190; and Short & Mellor's Pract. of the C. O. (attachment on a return of rescue) pp. 412
- "*Languidas.*" *et seq.* In the case of a return "*languidas*," the fact of the defendant's illness at the return of the writ should appear. *Perkins v. Meacher*, 1 D. P. C. 21; and see *Baker v. Davenport*, 8 D. & R. 606. Where a party in custody under a writ of *ca. sa.* was too ill to be removed without endangering his life, the Court enlarged the time for the return, but could afford the sheriff no relief for the extra costs of keeping up the caption.
- Insanity. *Jones v. Robinson*, 11 M. & W. 758; 12 L. J. Ex. 415. Where a return to a *latitat* stated that the defendant was insane and could not be removed without great danger and continued so until the return of the writ, it was held, that an attachment would not lie against the sheriff. *Cavenagh v. Collett*, 4 B. & A. 279.
- Privilege. If the sheriff cannot execute the writ on account of some privilege enjoyed by the defendant or the like, he returns the fact specially. A return of an escape would appear to be bad; see 14th ed. Chit. Arch. p. 899.
- Escape.
- Setting aside return. The Court will not set aside the sheriff's return to a writ of *capias* on an affidavit denying the truth of the return and charging collusion with the defendant. *Goubot v. De Crouy*, 2 D. P. C. 86; 2 L. J. (N. S.) Ex. 267.
- Action against sheriff for false return. In an action against the sheriff for a false return to a *ca. sa.*, it is not necessary to aver in the declaration that he had notice from the plaintiff that the defendant was within his bailiwick so that he might arrest him. *Hereford (Dean, &c.) v. Macnamara*, 5 D. & R. 95. And see as to action for a false return, *Howden v. Standish*, 6 D. & L. 312; 6 C. B. 504; 18 L. J. C. P. 33.
- Ruling sheriff Where one sheriff has made a special return to a writ of *capias*

the Court will not compel his successor to make another, the circumstances remaining unaltered. *Pasmore v. Wilkinson*, 3 D. P. C. 635. Where a *ca. sa.* has been sued out and the parties subsequently compromise, the Court will not compel the sheriff to return the writ, although he has been ruled to do so by the plaintiff's attorney, without whose consent the compromise has been effected. *Hedges v. Jordan*, 5 D. P. C. 6. It is irregular that a defendant should, without the plaintiff's authority, rule the sheriff to return a *ca. sa.* which has not been executed, but such proceeding is not in itself a contempt of process of the Court. *Daniels v. Gompertz*, 3 Q. B. 322; 2 G. & D. 751. The Court will not assent to an application on the part of the defendant against a sheriff to return a *ca. sa.* issued against him unless he shows some special grounds for the application. *Williams v. Webb*, 2 Dowl. N. S. 904; 5 Scott, N. R. 901; 7 Jur. 155.

to return writs.

After compromise between parties.

Who entitled to rule.

"A return that the defendant is sick, in prison, or a lunatic is good; but if the sheriff go out of office, and a new sheriff be appointed before the return, the return should be made in the name of both; by the old sheriff that he delivered the body to the new sheriff, by the new sheriff, *languidas*." 2nd ed. Watson on Sheriffs, p. 238.

Where new sheriff appointed before return.

A return in these words "I had not at the time of receiving this writ, nor have I since had the body of A. B. detained in my custody, so that I could not have her," &c. is a bad return, and an attachment was granted against the party who made it. *Rex v. Winton*, 5 T. R. 89.

Insufficiency of return.

Forms of Return.

1. *Return of Cepi Corpus.*

I have taken the within-named whose body I have ready,
as I am within commanded.

The answer of esquire sheriff.

2. *Return of Non est inventus.*

The within-named is not found in my bailiwick.

The answer of esquire sheriff.

3. *Return of Capi Corpus as to one Defendant, and Non est inventus as to another.*

I have taken the within-named whose body I have ready, as I am within commanded: but the within-named is not found in my bailiwick.

The answer of esquire sheriff.

4. *Return of Capi Corpus (bail taken).*

On the day of 18 I took the within-named in my bailiwick and him safely kept until he gave me bail as within I am commanded.

The answer of esquire sheriff.

5. *Return of Capi Corpus (security given).*

On , I took the within-named in my bailiwick, and him safely kept until he deposited in Court the sum of £ [or "gave to the plaintiff a bond executed by him and two sufficient securities in the penalty of £ " or *set out the security given, and the plaintiff's consent to it*], by way of security that he would not go out of England without leave of the Court, as by this order required, as I am within commanded.

The answer of esquire sheriff.

6. *Return of Capi Corpus (defendant in prison).*

On , I took the within-named and for the purpose within mentioned, whose body remains in the prison of our lady the Queen, under my custody.

The answer of esquire sheriff.

7. *Return of Capi Corpus to Writ of Ca. Sa.*

— } I esquire sheriff of the said county do humbly certify to wit. } and return to [*name of Judge by whom writ signed*] Her Majesty's Judge mentioned in the writ to this schedule annexed, that the said in the said writ named was taken on the day of 18 and in Her Majesty's gaol in and for the said county at is detained under my custody, by virtue of a writ of capias ad satisfaciendum, the tenor of which said writ follows in these words "Victoria, &c." [*setting forth the writ and all indorsements thereon verbatim*] And this is the cause [*or "causes"*] (g) of taking

(g) In case of the prisoner being detained by several writs, all the writs should be set out in the return in like manner. If the prisoner was taken in the late sheriff's time, the above form would do, but it is better to state that the prisoner was taken by the late sheriff, and after setting out the writ, "which said writ and the custody of the body of the said was duly assigned transferred and delivered over to me by the said late sheriff at his going out of office." Watson on Sheriffs, 2nd ed. p. 476, n.

the said which together with his body I have ready as by the said writ I am commanded.

The answer of esquire sheriff.

8. *Return of Cepi Corpus and Discharge out of Custody.*

I have taken the within-named and committed him to the common gaol of our Lady the Queen at there to be kept in safe custody so that I might have his body before the justices of Her Majesty's High Court of Justice Division at Westminster as within I am commanded. And I do hereby further certify and return that afterwards, that is to say on the day of A.D. 18 by command of a certain other writ of our Lady the Queen to me directed and delivered, a transcript whereof is annexed to this writ, I caused the said to be delivered from that prison, and therefore the body of the said before &c. at the day and place within contained I cannot have as within I am commanded.

The answer of &c.

9. *Return of prior removal by Habeas Corpus.*

By virtue of this writ to me directed I did on the day of take the within-named and did safely keep him in Her Majesty's prison in and for the county of until afterwards, to wit on &c. I received Her said Majesty's writ of *habeas corpus cum causâ* commanding me to have the body of the said before at immediately after the receipt of that writ: By virtue of which said writ on the day and at the place therein mentioned I had the body of the said before &c. who then received of me the body of the said and then committed him to the Queen's prison [*or as the case may be*] and then wholly discharged me from further keeping him under my custody: wherefore I cannot have the body of the said before our said Lady the Queen at the day and place within contained as within I am commanded.

The answer of &c.

10. *Return of Languidas.*

By virtue of this writ to me directed, I took the within-named at a dwelling-house, situate in the parish of , in my county, but the said was then so sick and ill, and in so weak, infirm and debilitated a state, that he could not be taken or removed from the said dwelling-house, to the common gaol of my said county, without great peril and danger of his life: and the said for the cause aforesaid, was kept and remained and continued, and still is kept and remains and continues, in my custody in the said dwelling-house, so sick and ill, and in such a weak, infirm and debilitated state as aforesaid, that I cannot, without peril and danger of his life, have the body of the said before our said lady the Queen in the Division of the High Court of Justice as I am within commanded.

The answer of esquire sheriff.

11. *Return of Rescue.*

By virtue of this order to me directed, I made my warrant in writing, under my seal of office, to and my bailiffs, jointly and severally to take and arrest the within-named : by virtue of which warrant the said and afterwards, on , at , in my county, and within my bailiwick, took and arrested the within-named according to the exigency of the said order, and safely kept him in their custody until of , and other persons to me and my said bailiffs unknown, on , at aforesaid, with force and arms assaulted and ill-treated my said bailiffs, and the said out of the custody of my said bailiffs then and there rescued, and the said then and there with force and arms rescued himself, and escaped out of the custody of my said bailiffs, against the peace of our lady the Queen: and afterwards the said is not to be found in my bailiwick.

The answer of esquire sheriff.

12. *Return to Ca. Sa. that Defendant was a Member of Parliament on its Dissolution, and that Forty Days since the Dissolution have not elapsed.*

I certify and return to our lady the Queen in the Division of the High Court of Justice, that the within-named before and at the time of the dissolution of the last Parliament of the United Kingdom of Great Britain and Ireland, was a member of the House of Commons of the said Parliament and served as such, and was entitled to his privilege of Parliament; and I further certify and return that this writ was delivered to me after the said dissolution, and that forty days since the said dissolution have not yet elapsed, and the said continuing to have his privilege of Parliament and freedom from arrest and imprisonment on civil process, I cannot have his body before Her Majesty in the said Division of the High Court of Justice, at the time and place within-mentioned, as I am within commanded.

The answer of sheriff.

13. *Return of Mandavi Ballivo.*

By virtue of this writ to me directed, I made my mandate to the bailiff of the liberty of in my county, to take and arrest the within-named which said bailiff hath the full return of all writs and processes, and the execution of the same within the liberty aforesaid, so that no execution of this writ can be made by me within the said liberty, which said bailiff hath returned to me "that he hath taken the within-named whose body he hath ready" [or "that the within-named is not found in his bailiwick"]: And I further certify that the said is not found in my bailiwick.

The answer of sheriff.

14. *Return to Ne Exeat Regno.*

I have caused the within-named corporally to come before me, and he found bail in the penalty of £ according to the command of the within writ.

The answer of sheriff.

Incidental.

See, as to excuse for non-compliance with the writ of *habeas corpus*, *Reg. v. Barnardo, Re Tye* (No. 1), 23 Q. B. D. 305; 58 L. J. Q. B. 553; 24 Q. B. D. 283; affirmed with variations, H. L., W. N. (1892) 132; *Barnardo v. Ford*, [1892] A. C. 326; 61 L. J. Q. B. 728; 67 L. T. 1. And as to production of corpus, see *In re Thompson, Reg. v. Woodward*, 5 T. L. R. 565, 601.

If disregard is shown to a *habeas corpus* at common law, an attachment will be immediately granted. *Ex parte Bosen*, 2 Ld. Ken. 289. As to an appeal against an order for attachment for disobedience to a writ of *habeas corpus*, see *Reg. v. Barnardo, Re Tye* (No. 1), *ante*; although see also *O'Shea v. O'Shea*, 15 P. D. 59; 59 L. J. P. 47; 38 W. R. 374, C. A.; where *Reg. v. Barnardo, ante*, distinguished.

Non-compliance with *habeas corpus*.

Attachment for disobedience to *habeas corpus*, and appeal.

Fees.

See under title "Sheriffs' Fees," Chap. XXXI., *post*, p. 505.

CHAPTER XIII.

WRITS OF VENIRE FACIAS AND DISTINGAS (PROCESS IN CONNECTION WITH INDICTMENTS).

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Introductory.

Process in connection with indictments.

IN relation to the process directed to sheriffs in connection with indictments, see Crown Office Rules, 1886, rr. 83—98 (Appearance to Indictment, Information and Requisition), from which it will be observed that such consists of (1) Writ of *Venire Facias* (rr. 94, 98); (2) Writ of Attachment (r. 95) (a); (3) Writ of *Distringas* (rr. 96, 98); and (4) *Capias ad respondendum* (r. 97) (a). *Distringas* is also used against inhabitants, after conviction, for not repairing a highway. And see in relation to indictments under titles “Recovery of Fines, Penalties, &c.,” “Writ of Abatement,” and “Writ of Restitution,” *post*, pp. 211, 213, 232.

Venire facias, when issued.

“When any indictment has been found in, or removed into the Queen’s Bench Division at the instance of the prosecutor, or of one or more of several defendants, the prosecutor may, instead of applying for a warrant under rules 85—87, issue a writ of *venire facias* against such defendants as are not parties to the removal of the indictment, or defendants under recognizance to answer, or in the case of an information, may issue either a *subpoena* to answer, or a *venire facias* if it is intended to proceed to outlawry.” C. O. R., 1886, r. 94.

Subpoena to answer.

(a) As to which, see under title “Arrest,” *ante*, p. 154.

"If a defendant fails to appear within four days after the sheriff has returned to the Court on the *venire facias* that he has summoned the defendant, the prosecutor may issue a writ of *distringas*." *Ib.* r. 96. *Distringas*, when issued.

"The process against a body corporate or inhabitants of a county, borough, parish, or place, to compel an appearance shall be by writs of *venire facias* and *distringas*. If such defendants do not appear within four days after the sheriff has returned that he has distrained the defendants' land and chattels, *alias* and *pluries* writs of *distringas* may be issued with such increased amounts upon each succeeding writ as the Court or a judge may order." *Ib.* r. 98. Process against a body corporate, &c. by *venire facias* and *distringas*.

As already intimated, the writ of *distringas* is also used against inhabitants, after conviction, for not repairing a highway. *Distringas* for non-repair of highway.

As to *venire facias* and *distringas* in relation to outlawry, see C. O. R. 99 and 100, *ante*, p. 34, and under title "Outlawry," *post*, p. 229. *Venire facias* and *distringas* in relation to outlawry.

Forms of Writs.

1. *Writ of Venire Facias, to answer* (Form No. 52, C. O. R. 1886).

VICTORIA, by the Grace of God, &c., to the Sheriff of greeting: We command you that you cause to come before Us in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, on the day of , 18 , A. B., to answer to Us for certain misdemeanors whereof he is indicted, and have you then there this writ.

Witness, &c.

This writ was issued by, &c.

2. *Writ of Distringas, to answer* (Form No. 56, C. O. R. 1886).

VICTORIA, by the Grace of God, &c., to the Sheriff of greeting: We command you that you distrain A. B. by all his lands and chattels in your bailiwick, so that neither he nor any one for him do put his hands to the same, until you shall have another command from Us for that purpose. And that you answer to Us for the issues thereof, so that you may have him before Us in the Queen's Bench Division of Our High Court of Justice at the Royal Courts of Justice, London, on the day of , 18 , to answer to Us for certain whereof he is indicted [*or impeached*], and to hear his judgment for his many defaults, and have you then there this writ.

Witness, &c.

3. *Writ of Distringas against Inhabitants after Conviction for not repairing a Highway* (Form No. 146, C. O. R. 1886).

VICTORIA, by the Grace of God, &c., to the Sheriff of _____, greeting: Whereas some time ago, that is to say, on, &c., at, &c., before &c. [*recite the caption and the indictment*], which said indictment We did afterwards, for certain reasons, cause to be brought before Us in the Queen's Bench Division of the High Court of Justice to be determined according to the law and custom of England. And whereas afterwards such proceedings were had in Our said Court before Us on the said indictment, that the inhabitants of the said _____ by a certain jury of the country taken between Us and the said inhabitants [*or by their own default*] stand convicted of the nuisances above mentioned and specified and charged upon them in the indictment aforesaid, in manner and form as in and by the said indictment is above alleged against them. And whereas thereupon it has been considered and adjudged by Our said Court before Us that the said inhabitants of _____ should be distrained for the nuisances aforesaid, as in Our said Court before Us it appears upon record. We therefore command you that you distrain the inhabitants of the parish aforesaid in your said county by all their lands and chattels in your bailiwick, so that neither they nor any one for them do put their hands to the same until you shall have another command from Us for that purpose. And that you answer to Us for the issues thereof, so that they, the inhabitants of the said parish, may, at their own proper costs and charges, well and sufficiently repair and amend that part of the said common and ancient Queen's highway so out of repair as aforesaid, if before it shall not be repaired and amended by them. And how you shall execute this Our writ make known to Us in Our said last mentioned Court immediately after the execution thereof. And have then there this writ.

Witness, &c.

4. *Writ of Supersedeas to Distringas* (Form No. 171, C. O. R. 1886).

VICTORIA, by the Grace of God, &c., to the Sheriff of _____, greeting: Whereas A. B. has appeared in the Queen's Bench Division of Our High Court of Justice to an indictment against him for certain misdemeanours [*or felonies*]. We therefore command you that you wholly supersede the distraining or otherwise molesting any longer the said A. B. on account of the premises aforesaid. And if you have distrained the said A. B. that then you do without delay deliver or cause to be delivered to him that which you have so distrained, if he be thereby distrained for the reasons aforesaid and no other, and this you are not to omit.

Witness, &c.

Execution of Writs.

Venire facias.

Summoning
party and
return.

The writ of *venire facias* is delivered to the sheriff for execution in the usual way. It is the sheriff's duty to summon the

party upon the *venire*; and he returns to the writ accordingly, or that the party has not any goods in his (the sheriff's) bailiwick by which he can be summoned.

As to order to return writ, see C. O. R. 1886, r. 233, and under title "Liability and Rights of Sheriff and Remedies against Sheriff," *post*, pp. 494 *et seq.*, in reference to attachment against the sheriff for omitting to return writ. Order to return.

When a defendant, not under recognizance, receives a summons from the sheriff upon the *venire*, his solicitor may enter an appearance for him at the Crown Office. Entry of appearance of defendant by solicitor.

Distringas.

As to the mode of executing this writ, the following quotation from Watson on Sheriff Law respecting *Distringas* in the old process in real actions may be taken as more or less still applicable:—"The sheriff may distrain either the moveable goods of the defendant (*b*) or the issues [proceeds of a distress] of his land; and for this purpose he issues his warrant to two bailiffs who are to execute the *distringas*. The sheriff may either keep the goods so distrained, or take money, or an obligation for the appearance of the defendant or tenant, according to the exigency of the writ. The return of the sheriff is, that he has distrained the defendant by his lands and chattels, to which he adds the amount of the issues and the names of the manucaptors (*c*). The issues returned must be reasonable. Where the sheriff returned *mandari ballivo* without also returning that the defendant had no issues in his bailiwick, the return was bad, and the sheriff was amerced." For forms of return, adapt those given by Watson. Return.

As to order to return writ, see C. O. R. 1886, r. 233; and under title "Liability and Rights of Sheriff and Remedies against Sheriff (Attachment against the Sheriff for omitting to return Writ, &c.)," *post*, pp. 494 *et seq.* Order to return.

On the defendant entering an appearance to the writ of *distringas*, a *supersedeas* may be issued to the *distringas*, as to the form of which see Form No. 4, *ante*, p. 208. Other writs of a *Supersedeas* to *distringas*,
and other writs.

(*b*) The sheriff levies 40s. upon the goods of the defendant.

(*c*) Or that the defendant has not any goods in his bailiwick.

like nature must be superseded in the same way on the defendant doing that which the writ was issued to compel. The form of the writ of *supersedeas* must be altered to suit the particular case.

Fees.

See under title "Sheriffs' Fees, &c.," *post*, p. 505.

CHAPTER XIV.

WRIT OF ABATEMENT OR DE NOCUMENTO AMOVENDO.

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Introductory.

THE writ of abatement (*de nocumento amovendo*) is issued where a defendant is indicted and convicted for obstructing a highway, or for other nuisances. It sets out that the defendant has been adjudged and ordered to pay a fine for the nuisances charged against him, and directs the sheriff to remove, or cause to be removed, the obstruction or other nuisance.

Form of Writ.

Writ of Abatement or Nocumento Amovendo (Form No. 147, C. O. R. 1886).

VICTORIA, by the Grace of God, &c., to the Sheriff of , greeting: Whereas, on the day of , at , &c. [*recite the caption of the indictment and the indictment*]. Which said indictment We afterwards, for certain reasons, caused to be brought before Us in the Queen's Bench Division of Our High Court of Justice, to be determined according to the law and custom of England. And whereas thereupon afterwards, that is to say, at the assizes holden at in and for the county of on the day of 18 , before and , justices, &c., upon the trial of the issue joined between Us and the said R. W., he the said R. W. was in due manner convicted of the matters contained in the said indictment, in manner and form as in and by the said indictment was alleged against him, as in the said Queen's Bench Division before Us it more fully appears upon record. Whereupon on the day of 18 , it was adjudged and ordered by Our said Court before Us that the said R. W. for the

nuisances aforesaid charged upon him by the said indictment, whereof he was so convicted as aforesaid, should pay a fine of . And that such nuisances should be abated as in Our said Court before Us it also appears upon record. We therefore command you that the said , so erected and built upon the said highway at the parish of in the said county of and so as aforesaid continued as in the said indictment mentioned, you do without delay remove, or cause to be removed, and how you shall execute this Our writ make known to Us in Our said Court immediately after the execution thereof, and have then there this writ.

Witness, &c.

CHAPTER XV.

RECOVERY OF FINES, PENALTIES, ETC.

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I. FINES ON INDICTMENTS AND PENALTIES ON AFFIRMANCE OF
CONVICTION.

WITH regard to indictments removed into the Queen's Bench Division, in the event of a fine being imposed and the defendant not being committed to the Queen's prison or ordered to be further imprisoned until its payment, then (on the authority of *R. v. Temple*, 1 Salk. 56, and *Duke's Case*, 1 Salk. 400) a *capias pro fine* may, it seems, be issued for the enforcement of such fine, or (on the authority of *R. v. Woolf*, 2 B. & Ald. 609) its recovery may be enforced by a *fieri facias*, or writ of *levari facias* (a). (See Forms of *Fi. Fa. for fine* and *Levari facias*, Nos. 145 and 143, C. O. R. 1886, *post*, p. 214; as also, with regard to *Levari facias*, No. 142.)

(a) It will be observed that the writ of *levari facias* was abolished by the Bankruptcy Act, 1883, s. 146 (2), in any civil proceedings.

Indictments
against in-
habitants for
non-repair of
highway.

A writ of *distringas* may be issued against inhabitants for conviction for not repairing a highway (see Form No. 146, C. O. R. 1886, *ante*, p. 208), and they may, it seems, be continuously distrained till its repair (*b*); or a writ of *levari facias* may be issued against inhabitants, &c., upon conviction and fine in respect of such disrepair. (See Form No. 143, C. O. R. 1886, *infra*.) Moreover, a body corporate may, it seems, be similarly dealt with, when found guilty of an offence other than the non-repair of a highway. (See Short & Mellor's Crown Office Practice, at p. 237.)

Process on
affirmance of
conviction.

On affirmance of conviction of justices, the process to recover the penalty is by *levari facias*. (Forms Nos. 149 and 150, C. O. R. 1886, *post*, pp. 215, 216.)

Forms of Writs.

1. Writ of *Fieri Facias* for a Fine (Form No. 145, C. O. R. 1886).

VICTORIA, by the grace of God, &c., to the Sheriff of , greeting: We command you that of the goods and chattels, lands and tenements of A. B., you cause to be levied pounds, imposed upon him in the Queen's Bench Division of Our High Court of Justice before him for his fine, for certain whereof he is impeached [*or indicted*], and thereupon, by a certain jury of the country [*or by his own default, or confession*], he stands convicted, as in Our Court before Us it appears upon record. And that you have the said money before Us in Our said Court immediately after the execution thereof, to satisfy Us for the said fine. And that you then have there this writ. Witness, &c.

2. Writ of *Levari Facias* against Inhabitants, &c., upon Conviction and Fine (Form No. 143, C. O. R. 1886).

VICTORIA, by the Grace of God, &c.,

To the Sheriff of , greeting:

Whereas sometime, that is to say, on the day of 18 , at [*the assizes, &c. Here recite the caption of the indictment*] by the oath of twelve jurors, good and lawful men of the said county of then and there sworn and charged to inquire for Us and the body of the said county.

It was presented as follows, that is to say:

[*Set out the indictment*]

Which said indictment we afterwards, for certain reasons, caused to be brought before Us, to be determined, according to the law and custom of England, and such proceedings were thereupon had in Our Court before Us, upon the said indictment, that the inhabitants of the said parish of by a jury of the country,

(*b*) See under title "*Distringas*," *ante*, p. 206.

taken between Us and the said inhabitants, stand convicted of the trespasses and nuisances above specified, and charged upon them, in and by the said indictment in manner and form as in and by the said indictment is alleged against them; and whereas it has thereupon been considered and adjudged in the Queen's Bench Division of Our High Court of Justice before Us, that the inhabitants of the said parish, for their offences aforesaid, should pay a fine of £ of lawful money of Great Britain, [*according to the order of Court for fine*], and that such fine should be paid into the hands of of to be by him applied, pursuant to the directions of the statute, in such case made and provided, as in Our said Court, before Us, it appears upon record. We therefore command you that of the goods and chattels, lands and tenements of the said inhabitants of the said parish of you levy, and cause to be levied, the said sum of £ being the fine so imposed upon them, in Our said Court, before Us, for their said offences whereof they are indicted and convicted, as aforesaid, and that you pay the said fine, when levied, into the hands of the said , to be by him applied to the repair of the said *several* highways, so as aforesaid, in decay and out of repair, pursuant to the directions of the statute, in such case made and provided; and how you shall have executed this Our writ, make known to Us in Our said last-mentioned Court immediately after the execution thereof. And have then there this writ.

Witness, &c.

This writ was issued by .

3. *Writ of Levavi Facias on conviction affirmed* (Form No. 149, C. O. R. 1886).

VICTORIA, by the Grace of God, &c.

To the Sheriff of , greeting:

Whereas I. G. was heretofore, to wit, on the day of 18 , at , on the complaint of , convicted by and before [*here recite the conviction*]. And whereas the said I. G. having appealed to the then next General Quarter Sessions of Our Peace, holden at in and for Our said county of , against the record of the said conviction, the same was by the Court of General Quarter Sessions aforesaid, rectified and confirmed. And whereas the said record of conviction, and the proceedings had thereon as aforesaid, were afterwards, by virtue of Our writ of Certiorari issued in that behalf brought before Us in the Queen's Bench Division of Our High Court of Justice that We might cause further to be done thereon what of right and according to the law and custom of England, We should see fit to be done, as appears to Us of record. And thereupon it was considered and adjudged by Our said Court before Us that the said record of conviction, and also the said order so made by the said Court of Quarter Sessions as aforesaid, should be affirmed, as in Our said Court before Us it also appears on record. We therefore command you, that of the goods and chattels, lands and tenements of the said I. G. in your bailiwick you cause to be levied the sum of so adjudged to have been forfeited as aforesaid by the said I. G., and that you have the said money before Us in Our said Court at the Royal

Courts of Justice, London, immediately after the execution of this Our writ to go and be applied according to the directions of the statute in such case made and provided. And have then there this writ.

Witness, &c.

[To be indorsed by order of Court.]

4. *Second Writ of Levari Facias on Conviction affirmed for residue where part Levied* (Form No. 150, C. O. R. 1886).

VICTORIA, by the Grace of God, &c.

To the sheriff of _____, greeting :

Whereas [here write the conviction as in the first writ (No. 3), and the first writ and return]. As by the return of the [then] sheriff to the said writ of *levari facias* in Our said Court before Us, it also appears upon record. We therefore command you that of the goods and chattels, lands and tenements of the said _____ in your bailiwick, you cause to be levied the sum of _____ residue of the said sum of _____ so adjudged to have been forfeited as aforesaid, by the said _____, and that you have the said sum of _____, residue of the said sum of _____, before Us in Our said Court at the Royal Courts of Justice, London, immediately after the execution of this Our writ to go [&c., as in No. 3].

Execution of Writs.

The writ of *fieri facias* for fine is executed similarly to an ordinary writ of *fieri facias*. See, therefore, under title "Writ of *Fieri Facias*," ante, p. 51. See also under that title for general guidance as to execution of writ of *levari facias*.

Forms of Warrants.

1. *Warrant on Levari Facias against Inhabitants, &c., upon Conviction of Fine.*

— to wit : _____ esquire, sheriff of the said county to _____ my bailiff greeting. By virtue of a writ of our Sovereign Lady the Queen to me directed and delivered bearing date the _____ day of _____ in the year of our Lord one thousand eight hundred and ninety _____ I command you that you cause to be levied of the goods and chattels, lands and tenements in my bailiwick of the inhabitants of the parish of _____ the sum of £ _____ being the fine so imposed upon them by virtue of [here set out particulars of the fine, &c. in question according to reference thereto given in the writ] so that I may pay the same into the hands of _____ as therein commanded. And in what manner you shall have executed this warrant certify to me immediately after the execution thereof.

Given under the seal of my office this _____ day of _____ 189 _____.

By the sheriff,

(Seal of Office.)

2. *Warrant on Levari Facias on Conviction affirmed.*

[Same as in preceding form to the word "bailiwick" and then continue thus:—] of of the sum of £ therein adjudged to have been by him forfeited [here set out particulars respecting the forfeiture in question according to reference thereto given in the writ] so that I may have the said money as I am therein commanded. And in what manner you shall have executed this warrant certify to me immediately after the execution thereof.

Given under the seal of my office this day of 189 .

By the Sheriff

(Seal of Office.)

3. *Warrant on Second Writ of Levari Facias on Conviction affirmed for Residue where Part levied.*

[Adapt last preceding form of warrant.]

Forms of Returns.

1. *Form of Return to Writ of Levari Facias against Inhabitants, &c. upon Conviction and Fine.*

By virtue of this writ to me directed I have caused to be levied of the goods and chattels, lands and tenements of the within named inhabitants of the parish of the sum of £ I further certify that I have paid the said fine so levied into the hands of of as I am within commanded.

The answer of Esq. Sheriff.

2. *Form of Return to Writ of Levari Facias on Conviction affirmed.*

By virtue of this writ to me directed I have caused to be levied of the goods and chattels, lands and tenements of the within named of the sum of £ which sum I have ready at the place within mentioned as I am within commanded.

The answer of Esq. Sheriff.

[or]

The within named of has no goods or chattels, lands or tenements in my bailiwick whereof I can cause to be made £ within mentioned or any part thereof as I am within commanded.

The answer of Esq. Sheriff.

3. *Form of Return to Second Writ of Levari Facias on Conviction affirmed for Residue where Part levied.*

[Adapt latter forms of return.]

Fees.

See under title "Sheriffs' Fees, &c.," *post*, p. 505.

II. SESSIONS AND ASSIZE FINES, ESTREATS, &C.

Recovery of sessions fines, &c. governed by 3 Geo. 4, c. 46, and 4 Geo. 4, c. 37.

Copy of roll of fines and writ to be sent to sheriff.

Appeal upon giving security.

Discharge of sheriff, &c.

Return of writ and indorsement of roll.

Sheriff's penalty for non-performance or negligence.

Sheriff to detain original writs.

Issue of warrant by one sheriff to another.

The recovery of quarter sessions fines, &c. is governed by 3 Geo. 4, c. 46, "An Act for the more speedy return and levying of fines, penalties, and forfeitures, and recognizances estreated," and by the amending Act of 4 Geo. 4, c. 37.

By 3 Geo. 4, c. 46, s. 2, statements of fines, &c. are to be certified to the clerk of the peace by the justice by whom such fine, &c. is imposed, and the clerk of the peace is to copy on a roll such fines, &c. at quarter sessions, and send a copy of such roll, with writ of *distringas* (c) and *capias* (d), or *fieri facias* (e) and *capias* (d) to the sheriff (f) within the time fixed by the Court and not exceeding twenty-one days after the adjournment of the Court.

By sect. 5, persons may appeal to quarter sessions against fines, &c. upon giving security to the sheriff or his officers.

By sect. 6, any order made under such appeal to discharge forfeited recognizances, &c. is to be a sufficient discharge to the sheriff or his officers on the passing of his accounts; and see on this *Haynes v. Hayton*, 7 B. & C. 293; *Ex parte Pellow*, M'Cle. 111; *Rex v. Hankins*, M'Cle. & Y. 27, as stated *per curiam* in *R. v. West Riding JJ.*, *In re Dr. Thornton*, 7 A. & E. 590.

By sect. 8, the sheriff is to return the writ to quarter sessions, and indorse on the roll what has been done in the execution of the process, which return, &c. shall be forwarded by the clerk of the peace to the Treasury.

By sect. 10, the clerk of the peace and other officers shall be entitled to their usual and legal fees on the discharge of any forfeited recognizance, and the sheriff is made liable to a penalty of 50*l.* recoverable as therein mentioned for non-performance or negligent performance of his above duties.

By 4 Geo. 4, c. 37, the sheriff is to detain the original writs in his possession, which shall continue in force and be his authority to act upon.

By sect. 3, where a person, subject to fines, &c. resides in another county, or has removed, the sheriff may issue his warrant to the sheriff acting for the place where the defaulter

(c) See under title "Writ of *Distringas*," *ante*, p. 206.

(d) See under title "Arrest," *ante*, p. 154.

(e) See under title "Writ of *Fieri facias*," *ante*, p. 51.

(f) The form in the Schedule to 22 & 23 Vict. c. 21, is substituted for that in Schedule A. to above Act, see *post*, p. 222.

resides, or where his goods are found, requiring him to execute the writ.

By sect. 5, clerks of the peace are to send to the Treasury within twenty days from the opening of the quarter sessions a copy of the rolls delivered by the sheriff (*g*). Copy of rolls to be sent to Treasury.

The contents of the roll is continued quarterly at the quarter sessions, and the sheriff re-issues his warrants to his officers for the recovery of the fines, &c. which have not been duly levied or recovered or properly accounted for or have not been discharged on appeal, and until the Commissioners of the Treasury direct a discontinuance in default of goods whereon to levy or the lodging in gaol of the defaulter. Warrants to be re-issued for fines, &c. not duly levied, &c.

The sheriff is not, with respect to the roll of fines sent to him by the clerk of the peace pursuant to 3 Geo. 4, c. 46, merely a ministerial officer—his duty is to levy only such of the fines as have not been paid. Accordingly, the sheriff is not to act on such roll and levy the amount thereof, if he has received the fine himself. *Wildes v. Morris*, 16 Jur. 1115; 22 L. J. M. C. 4; and see *Reg. v. The Justices of Ely*, 25 L. J. M. C. 1; 5 E. & B. 489. Sheriff not to levy fines already paid.

It may be mentioned that, in the case of the City of London, the secondary must hand over the proceeds of estreats of fines, &c. to the City solicitor as the City bailiff. Secondary to hand proceeds to City solicitor.

Assize process is regulated by 22 & 23 Vict. c. 21, "An Act to regulate the office of Queen's Remembrancer, and to amend the practice and procedure of the Revenue side of the Court of Exchequer," the provisions of which Act are, it will be observed, similar to the foregoing. By sect. 32 of 22 & 23 Vict. c. 21, clerks of assize are required to estreat "fines, issues, amerciaments, penalties, and recognizances set, lost, imposed, or forfeited" into the Exchequer, and shall copy on a roll such fines, &c., "together with the names and residences, trades, professions, or callings of the parties, and distinguish such as have been paid, and send a copy of such roll, with a writ, according to the form and effect in the schedule to this Act, to the sheriff, bailiff, or officer of the county, city, borough, or place having execution of process therein in which the parties liable to the payment of such fines, issues, amerciaments, Recovery of assize fines, &c. governed by 22 & 23 Vict. c. 21.

Copy of roll of fines, &c. and writ to be sent to sheriff,

(*g*) Sect. 1 of 4 Geo. 4, c. 37, from "and such sheriff, bailiff, or other officer is hereby authorized and required on quitting his office" to "duly authorize to pass the same," and sect. 4, are repealed by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55).

and to be
authority to
levy or take
into custody.

penalties, and recognizances are stated to be resident, and such copy and writ shall be the authority to such sheriff, bailiff, or officer for proceeding to the immediate levying and recovering of such fines, issues, amerciaments, penalties, and recognizances on the goods and chattels of such parties, or for taking into custody their bodies in case sufficient goods and chattels be not found whereon distress can be made for recovery thereof; and every person so taken shall be lodged in the common gaol until payment be made or he be discharged by the authority of the Commissioners of Her Majesty's Treasury, or otherwise in due course of law; and it shall be competent for such commissioners to give authority under their hands for such discharge, either absolutely or on such terms and conditions as they may see fit: provided always, that where the residences of the parties in such roll liable as aforesaid are not all in one county, borough, city, or place, then a copy of so much only of such roll as relates to the fines, issues, amerciaments, penalties, and recognizances to be paid by the parties resident in each county, city, borough, or place shall be sent with such writ as aforesaid to the sheriff, bailiff, or officer having execution of process therein."

Persons taken
to be lodged
in common
gaol.

Sect. 33 provides for oath to be made by clerk of assize sending process.

Return of
writ by sheriff
to Treasury.

By sect. 34, the sheriff "is on such day as the Commissioners of Her Majesty's Treasury may from time to time, by warrant under their hands, direct, return such writ to such Commissioners, and shall state on the back of the said roll what has been done in the execution of such process."

Sheriff to
retain writ
until fines,
&c. are levied,

By sect. 35 (a), until the fines, &c. are paid, recovered, or discharged, or it be ascertained to the Treasury's satisfaction, that the party in default had not any goods or chattels in the county, city, borough, or place in which a levy can be made, and that such party cannot be found or that his body cannot be lodged in any of Her Majesty's gaols, the sheriff is to retain the writ and annexed roll, "delivering to the said Commissioners of Her Majesty's Treasury a copy of such roll on the day on which he is required to return such writ, and also a copy of any former roll or rolls in which the fines, issues, amerciaments, penalties, and recognizances have not been paid or discharged"; and which writ, &c. shall continue in force and be his authority to act upon; and (b) the sheriff, on quitting office, is to deliver over to his successor all rolls and writs, particularizing any

and to deliver
over to
successor all

unpaid or undischarged fines, &c., that such successor "may use every means in his power for recovering the sums unpaid and not charged to his predecessors on the passing of his accounts before any person duly authorized to pass the same."

rolls and writs.

By sect. 36, where the party incurring or subject to the payment of any fine, &c. resides or has fled or removed from or out of the sheriff's jurisdiction, the sheriff shall issue his warrant, together with a copy of the writ, directed "to the sheriff, bailiff, or other officer acting for the county, city, borough, or place in which such person then resides or is, or in which his goods or chattels may be found, requiring such sheriff, bailiff, or other officer to execute such writ, and every such last-mentioned sheriff, bailiff, or other officer is hereby authorized and required to act in all respects under such warrant in the same manner as if the original writ had been delivered to him, and the said sheriff, bailiff, or other officer is hereby required within thirty days after the receipt of such warrant to return to the sheriff, bailiff, or other officer from whom he received the same what he has done in the execution of such process, and in case a levy has been made, to pay over all moneys received in pursuance of the warrant to the sheriff, bailiff, or other officer from whom he received the same."

When sheriff to issue warrant to sheriff of another county.

By sect. 37, "every sheriff, bailiff, or other officer as aforesaid neglecting to do or perform any duty by this Act required shall forfeit and pay such sum as in sect. 10 of the said Act, 3 Geo. 4, c. 46, is provided for such neglect as therein mentioned, and to be recovered in like manner."

Penalty on sheriff for neglect.

By 3 & 4 Will. 4, c. 99, s. 32, process is to be issued by the Remembrancer of the Court of Exchequer every term or oftener to sheriffs to levy all other fines, penalties and forfeited recognizances, estreated to the Crown.

Process issued to sheriff by Remembrancer of Court of Exchequer.

Fines imposed by a coroner and forfeited recognizances at a coroner's court are imposed, estreated and recovered in like manner as fines, &c., at quarter sessions. (50 & 51 Vict. c. 71, s. 19.)

Recovery of fines imposed by coroner.

Execution.

This process is, with due regard to the foregoing directions, executed in a more or less similar manner to "*F. fa.*" and "Arrest," and the forms of return in such proceedings may accordingly be generally adapted.

Form of Writ.

(Form in Schedule to 22 & 23 Vict. c. 21.)

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith:

To the Sheriff or Bailiff or officer [*as the case may be*] for the county of _____ [*or city, borough, or place, as the case may be*] greeting.

You are hereby required and commanded, as you regard yourself and all yours. That you omit not, by reason of any liberty in your county, [*or city, borough, or place, as the case may be*], but that you enter the same, and of all the goods and chattels of all and singular the persons in the roll to this writ annexed, you cause to be levied all and singular the debts and sums of money upon them in the same roll severally charged, so that the money may be ready for payment at the [*time of the return of the writ*], to be paid over in such manner as the Commissioners of Her Majesty's Treasury may direct; and if any of the several debts cannot be levied, by reason of no goods or chattels being to be found belonging to the parties, then in all cases that you take the bodies of the parties refusing to pay the aforesaid debts, and lodge them in the gaol (of the county, city, &c.), there to remain until they pay the same, or be discharged by the authority of the said commissioners or otherwise in due course of law.

Dated the _____ day of _____ in the _____ year of our reign.

[Signature]
Clerk of Assize or Clerk of the Crown
[*as the case may be*].

Forms of Warrants.

1. *Warrant (Levy of Debts, &c.).*

_____) Esquire, Sheriff of the said county to _____ and
to wit.) my bailiffs, greeting: By virtue of a writ of Our
Sovereign Lady the Queen to me directed and delivered bearing
date the _____ day of _____ in the year of Our Lord one thousand
eight hundred and ninety _____ I command you and each of you
jointly and severally that of the goods and chattels of _____ of
_____ in my bailiwick you cause to be levied the sum of £
specified in the roll annexed to the said writ so that I may have
that money ready for payment over in such manner as the Com-
missioners of Her Majesty's Treasury may direct, as within I am
commanded. And in what manner you shall have executed this
warrant certify to me immediately after the execution hereof.

Given under the seal of my office this _____ day of _____ 189 _____.
By the Sheriff

(Seal of office.)

2. *Warrant (Arrest of Debtor).*

_____) Esquire, Sheriff of the said county, to the keeper
to wit.) of the gaol of the said county and also to _____ and

my bailiffs greeting: By virtue of a writ of Our Sovereign Lady the Queen to me directed and delivered bearing date the day of in the year of Our Lord one thousand eight hundred and ninety I command you and every of you jointly and severally that you omit not, &c. but take of wheresoever he may be found in my bailiwick and him safely lodge and keep in the gaol of to satisfy the sum of £ specified in the roll annexed to the said writ, as within I am commanded. And in what manner you shall have executed this warrant certify to me immediately after the execution hereof.

Given under the seal of my office this day of 189 .

By the Sheriff

(*Seal of office.*)

Fees.

See under title "Sheriffs' Fees, &c.," *post*, p. 505.

III. CUSTOMS AND EXCISE PENALTIES.

As to penalties (Customs), see 39 & 40 Vict. c. 36, ss. 247—254, and 46 & 47 Vict. c. 55, s. 19; and for penalties (Excise), see 7 & 8 Geo. 4, c. 53, ss. 95 and 96; and generally, see under title "Arrest," *ante*, p. 154.

CHAPTER XVI.

WRIT OF SCIRE FACIAS.

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Introductory.

THIS is a judicial writ in aid of a record, or, in other words, for the enforcement of a judgment. It has, moreover, been held to be in many cases an action. *Winter v. Kretchman*, 2 T. R. 46. It formerly also lay for the repeal of letters patent.

Whilst there have been actions of *scire facias* at common law since the Judicature Acts (*Portal v. Emmens*, 1 C. P. D. 201; and *Kipling v. Todd*, 3 C. P. D. 350), *scire facias* seems to be now a more or less obsolete, and certainly somewhat rare process. Moreover, its application for the repeal of letters patent is abolished by 46 & 47 Vict. c. 57, s. 26. It will also be observed that no allusion is made to *scire facias* in the Judicature Acts or the Rules of the Supreme Court, whilst by such rules "all actions previously . . . commenced by writ . . . shall be instituted in the High Court of Justice by a proceeding to be called an action" (Ord. I. r. 1), and "every action in the High Court shall be commenced by a writ of summons, which shall (*inter alia*) be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action" (Ord. II. r. 1); and further, that a fresh procedure is provided by the Rules of the Supreme Court for the various cases mentioned in the Common Law Procedure Act, 1852, s. 132, in relation to *scire facias* (a), save only the cases of "bail on a

(a) Viz., against bail on a "recognizance *ad audiendum errores*;" against members of a joint-stock company or other body upon a judgment recorded against a public officer or other person, sued as representing such company or body, or against such company or body itself; by or against a husband to have execution of a judgment for or against a wife; for restitution after a reversal in error; upon a suggestion of further breaches after judgment for any penal sum pursuant to 8 & 9 Wm. 3, c. 11; or for the recovery of land taken under an *elegit*.

recognizance," "restitution after a reversal in error," and "upon a suggestion of further breaches after judgment for any penal sum pursuant to 8 & 9 Wm. III. c. 11."

Again, with regard to its application on the Crown side, by C. O. R., 1886, r. 127, "no proceedings shall be taken in the Crown Office by *scire facias* upon recognizance."

And as to *scire facias*, see under titles "Writ of Extent," *ante*, p. 136, and "Execution against Companies," *post*, p. 243.

For the above reasons it is deemed unnecessary to go more fully into this branch. Moreover, any further information desired on this subject will be found in Chit. Arch. Practice and Short & Mellor's Crown Office Practice.

Execution of Writ.

See under "Execution of Writs" generally.

"The duty of the sheriff in a writ of *scire facias* is to indorse on it the day of the month on which it was left with him, and, if he knows the defendant can be served, to issue his warrant thereon to two or more bailiffs to warn the defendant; the bailiffs make an indorsement on this warrant either that they have or have not served the process, and return it to the sheriff; conformably thereto, the sheriff returns either '*nihil*' or '*scire feci*.'" 2nd ed. Watson on Sheriffs, p. 453.

Fees.

See under title "Sheriffs' Fees, &c.," *post*, p. 505.

CHAPTER XVII.

OUTLAWRY.

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Introductory.

Abolished in
civil pro-
ceedings ;

but not in
criminal pro-
ceedings.

Forms of
outlawry
process.

OUTLAWRY is the process of putting a man outside the protection of the law for his contempt in wilfully avoiding the execution of the process of the Queen’s Court, and is resorted to when the ordinary process of the law has failed to effect his apprehension. A person outlawed is *civiliter mortuus*. All his property is forfeited to the Crown and he is incapable of bringing any action for redress of injuries. However, by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 3, “After the passing of this Act no person shall be outlawed or waived in or in consequence of any civil proceedings, and no proceedings to outlawry or waiver in consequence of any civil proceedings shall be taken at the instance of the Crown or otherwise.” But in criminal cases, process of outlawry, although practically obsolete, has not, however, as yet been abolished (see Report of Criminal Code Commissioners, p. 36), and it lies upon all indictments for treason, felony or misdemeanour. It also lies upon criminal informations filed in the Queen’s Bench Division. *Rev v. Wilkes*, 4 Burr. 2555.

For the Crown Office Rules relating to outlawry, see C. O. R., 1886, rr. 99—121, under title “General Practice,” *ante*, p. 34, and see Forms of Outlawry Process, Forms Nos. 52, 56, 57, 58, 60, 59, 61, 62, 63, 64, 144 and 65 in Appendix to Crown Office Rules, 1886, and in the above order. In view of the abolition

of outlawry proceedings in civil process and of their rarity of late years in criminal cases, it is deemed preferable to avoid unnecessarily lengthening this work by setting out these forms.

Execution.

Supplementing the information given by the Crown Office Rules relating to outlawry, as set out at p. 34, *ante*, and the above-mentioned forms of outlawry process, the following extract from Watson on Sheriffs, p. 222 *et seq.* as to the mode of execution of the writ of exigent will be of service:—"The mode in which the sheriff should execute the writ of exigent is by calling upon the defendant, at each county court after the receipt of the writ, to appear; and the sheriff must not omit any county court, for if a county court intervene between any of the exactions without the defendant being demanded there, it is error. In criminal proceedings, where the defendant is not bailable, as in treason or felony, it is clear that the sheriff should keep the defendant in custody; but before judgment, if the defendant appear upon the exigent, issued on an indictment for a misdemeanour it is apprehended that the sheriff might take a recognizance for his appearance; but after judgment it is clear that he could not, but that he should keep him in safe custody. After being five times demanded, if proclamations have been duly made, the defendant is declared to be outlawed by the coroner of the county in the county court." A judgment of outlawry is not complete unless it has been entered on the rolls, and it is not sufficient to state simply that the writ of exigent was duly returned by the sheriff. *Att.-Gen. v. Rickards*, 14 L. J. Ch. 363. "Great particularity is required in the return to the exigent for, as the consequences of outlawry are considered so penal, any irregularity will be fatal."

Writ of
exigent.

Outlawry,
when com-
plete.

The following is a form of the sheriff's warrant to his bailiff on exigent, authorizing him to make proclamations according to the exigency of the writ:—

Warrant to
bailiff on
exigent.

Warrant to Bailiffs on Exigent.

—) sheriff of the county aforesaid, to and
to wit. My bailiffs, greeting: By virtue of a writ of our Sovereign
Lady the Queen to me directed, I command you that you or one of
you demand from County Court to County Court, until,

according to the law and custom of England, he be outlawed if he do not appear, and if he do appear, then that you take and safely keep him so that I may have his body before the Queen on the day of next, wheresoever &c., to answer in an action. And how you shall have executed this my warrant make known to me.

Hereof fail not. Given under the seal of my office this day of in the year of our Lord one thousand eight hundred and

Warrant to
bailiff on
capias utla-
gatum.

The following is a form of the sheriff's warrant directed to his bailiff on a *capias utlagatum* :—

Warrant to Bailiff on Capias Utlagatum.

County of B.) esq., sheriff of the county aforesaid, to
to wit.) and my bailiffs, greeting: By virtue of Her Majesty's writ of *capias utlagatum* to me directed and delivered, I do hereby command you and each of you jointly and severally that you take C. D. wheresoever he may be found in my bailiwick and him safely keep, so that I may have his body before our Lady the Queen [*or before the justices of our Lady the Queen*] at on the day of A.D. 18, as in the said writ I am commanded. And in what manner you shall have executed this warrant certify to me immediately after the execution thereof. Given under the seal of my office this day of A.D. 18.

Sheriff.

In executing
capias utla-
gatum outer
doors may
be broken.
Execution
within
liberty.

After demand and refusal, outer doors may be broken open by the officer in executing a *capias utlagatum* in order to take the defendant or his goods. *Rex v. Bird*, 2 Show. 87. As the writ is *non-omittas* the sheriff may execute it within a liberty without sending his mandate to the bailiff of the liberty. 2nd ed. Watson, p. 228.

Inquisition on
special capias
utlagatum.

If the defendant is not taken on a *special capias utlagatum*, the sheriff must impanel a jury whose duty it is to inquire of and value the goods and chattels, lands and tenements of the defendant, and it seems that the sheriff should still hold the inquisition even though the outlaw dies after the teste of the *special capias utlagatum*.

Charging and
swearing
jury.

In connection with the writ of *capias utlagatum special cum breve de inquirendo*, the jury are charged and sworn in the following forms :—

Charge to Jury.

Your charge is to inquire what goods and chattels, lands and tenements, C. D. of hath in my bailiwick, and also to inquire and say what is the true value thereof.

Juror's Oath.

You shall well and truly try what goods and chattels, lands and tenements, C. D. of has and the value thereof, and a true verdict give according to the evidence. So help you God.

Returns.

To the writ of *venire facias* the sheriff will return *cepi corpus* if he has taken the defendant, and either has him in custody or has released him on bail; but if he cannot execute the writ, he will return either that he has summoned the defendant and he has not appeared, or that the defendant has no goods in his bailiwick whereby he can be summoned or distrained. If the sheriff return that the defendant has been summoned and has not appeared, the prosecutor may issue a *distringas* to answer, and if the sheriff return that the defendant has no goods whereby he can be summoned, a *capias ad respondendum* may be issued on the fourth day after the return. C. O. R. 1886, Rule 100.

Return to
venire facias.

For the various returns to be made, the reader is referred to the Crown Office Rules relating to outlawry, *ante*, p. 34, whilst as to the writ of *capias ad satisfaciendum*, one or other of the applicable return forms under "Arrest," *ante*, p. 201, should be adopted; and as to forms of return, see also the form of roll of proceedings in outlawry in Short & Mellor's Pract. of the C. O., App. E., No. CCXLI.

Returns
generally.

On a *special capias utlagatum*, if either the goods or the profits of lands have been found by the inquisition, the sheriff should return the inquisition; but if the jury find that the defendant has no goods, &c., the inquisition should not be returned, but the sheriff should return that the defendant has no goods, &c., in his bailiwick.

Return of
inquisition to
special capias
utlagatum.

Forms of Returns and Inquisition.

The following forms of returns and inquisition from Watson on Sheriffs will be of service:—

1. *Return to the Exigent, Quinto Exactus, and Outlawed.*

By virtue of this writ to me directed, at my county court at A., in and for the county of N., on , the day of , in the year of the reign of our Sovereign Lady Queen Victoria, the within-named C. D. was a first time demanded, and did not appear: And at my county court, held at A. aforesaid, in and for

the said county of N., on , the day of , in the year aforesaid, the said C. D. was a second time demanded, and did not appear: And at my county court held at A. aforesaid, in and for the said county of N., on the day of , in the year aforesaid, the said C. D. was a third time demanded, and did not appear: And at my county court, held at A. aforesaid, in and for the said county of N., on the day of , in the year aforesaid, the said C. D. was a fourth time demanded, and did not appear: And at my county court held at A. aforesaid, in and for the said county of N., on the day of , in the year aforesaid, the said C. D. was a fifth time demanded, and did not appear. Therefore by the judgment of X. Y. coroner of our Sovereign Lady the Queen for the said county of the said C. D. according to the law and custom of England is outlawed [*or, if a woman, "waived"*].

The answer of A. B. esquire, sheriff.

2. *Return to Exigent, where there are not five County Courts.*

By virtue of this writ to me directed, at my county court, held at A., in and for the county of N., on the day of , in the year of the reign of our Sovereign Lady Queen Victoria, the within-named C. D. was a first time demanded.

Answer A. B., esquire, sheriff.

3. *Where the Sheriff goes out of Office, and the new Sheriff exacts the Defendant.*

[*In addition to the last Precedent.*]

This writ, as above indorsed, was delivered to me, the under-named present sheriff, by the above-named late sheriff, at his going out of office. At my county court, held at A. [*as above*].

4. *Where the Defendant appears.*

By virtue of this writ to me directed, at my county court, held at A., in and for the said county of N., on the day of , in the year of the reign of our Sovereign Lady Queen Victoria, the within-named C. D. was a first time demanded, and then and there appeared, and then rendered himself into my custody; whose body I have ready, before our Lady the Queen, at the day and place within-mentioned, as within I am commanded.

The answer of A. B., esquire, sheriff.

5. *Return to the Writ of Proclamations.*

By virtue of this writ to me directed, I have caused the within-named C. D. to be proclaimed at my county court, held at A., within my bailiwick, the day of , in the year within mentioned: I also caused him to be proclaimed at the general quarter sessions of the peace, held at M., within my bailiwick, the day of , in the same year: And I likewise caused him to be proclaimed at the usual door of the parish church of H., within my bailiwick (in which said parish the said C. D. lived), on Sunday, the day

of _____, in the same year; that he may render himself unto me [or, if a foreign proclamation, "to the sheriff of _____, so that they,"] so that I may have his body before Her Majesty's justices at Westminster, at the time within mentioned, to answer the within-named J. W., of the plea within mentioned.

The answer of A. B., esquire, sheriff.

6. *Return to special Capias Utlagatum.*

The execution of this writ appears in a certain schedule hereunto annexed.

The answer of A. B., esquire, sheriff.

7. *Inquisition (a).*

N. (to wit.) An inquisition indented, taken at A., in the county of N., the _____ day of _____, in the _____ year of the reign of Our Sovereign Lady Queen Victoria, before me, A.B., esq., sheriff of the said county of N., by virtue of Her said Majesty's writ to me directed in this behalf, and to this inquisition annexed, by the oath of [here name the jurors who were upon the inquest] twelve honest and lawful men of the county aforesaid, who say upon their oath, that C.D. named in the writ hereunto annexed, on the _____ day of _____ last past (on which day he was outlawed, as in the said writ is mentioned), was possessed of the goods and chattels following: that is to say, [here describe the goods] of the value of £ _____, of his own proper goods and chattels; [or, if he had no goods say "had no goods nor chattels in my bailiwick to the knowledge of the said jurors"] : and the jurors aforesaid, upon their oath aforesaid, do further say, that the said C.D., on _____ last past (on which day he was outlawed as aforesaid) was seized in his demesne as of fee of and in _____, with the appurtenances, now in the tenure and occupation of P.M., the same being of the yearly value of £ _____, in all issues beyond reprice; all and singular which said goods and chattels, lands and tenements, I the said sheriff, by virtue of the said writ, on the day of the taking of this inquisition, have taken and caused to be seized into the hands of our said Lady the Queen as by the said writ I am commanded. And the jurors aforesaid, upon their oath aforesaid, do further say, that the said C.D., on _____ last past (on which day he was outlawed as aforesaid), or at any time afterwards, had not, nor hath he any other or more [goods or chattels, lands or tenements] in my bailiwick, to the knowledge of the said jurors. In witness whereof, as well as I the said sheriff, as the jurors aforesaid, have set our respective seals.

(Seal of office.)

(Twelve seals.)

Fees.

See under title "Sheriffs' Fees, &c.," *post*, p. 505.

(a) In connection with special *capias utlagatum*.

CHAPTER XVIII.

WRIT OF RESTITUTION.

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Introductory.

THIS writ lies on reversal or setting aside of judgment for restoration to a party of the property he has lost by the judgment, and where such is impracticable in the ordinary course of law. It may also be awarded on indictments for forcible entries into and detainer of premises (a).

Form of Writ.

Writ of Restitution (Form No. 148, C. O. R. 1886).

VICTORIA, by the Grace of God, &c., to the Sheriff of greeting: Whereas some time ago, that is to say, on [*copy the caption of the indictment and the indictment*] which said indictment We did afterwards, for certain reasons, cause to be brought before Us in the Queen's Bench Division of Our High Court of Justice, to be determined according to the law and custom of England. And whereas such proceedings were afterwards had in Our said Court before Us upon the said indictment, that the said by a jury of the county taken between Us and the said stands convicted of the premises in the indictment above specified and charged upon him, in manner and form as in and by the said indictment is within alleged against him, as in Our said Court before Us it appears upon

(a) For further information hereon, see 14th ed. Chit. Arch., pp. 834, 993, and 1229, and Short & Mellor's Practice of the Crown Office, pp. 447—449. See also under title "Scire Facias," ante, p. 224, in relation to restitution after a reversal in error.

record. We therefore, being willing that due and speedy justice should be done in the premises, do command you that you cause to be reseised and restored to the said the aforesaid messuage, with the appurtenances situate in the parish of , in the said indictment specified. And that you do without delay cause the said to be put into full possession thereof. And how you shall have executed this Our writ make known to Us in Our said Court immediately after the execution thereof. And have then there this writ.

Witness, &c.

Execution of Writ.

The particular form of this writ and the foregoing definition of the object and application of this process generally indicate the mode of its execution. See also in this respect the somewhat similar process of Writ of Possession, the forms in which latter process may accordingly be adapted with the necessary alterations.

Fees.

See under title "Sheriffs' Fees," &c., *post*, p. 505.

CHAPTER XIX.

EXECUTION AGAINST COMPANIES.

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Preliminary.

Acts relating
to companies.

THE Acts relating to companies are the Companies Act, 1862 (25 & 26 Vict. c. 89), the Companies Act, 1867 (30 & 31 Vict. c. 131), the Companies Act, 1870 (33 & 34 Vict. c. 104), the Companies Act, 1877 (40 & 41 Vict. c. 26), the Companies Act, 1879 (42 & 43 Vict. c. 76), the Companies Act, 1880 (43 Vict. c. 19), the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), the Companies Winding-up Act, 1890 (53 & 54 Vict. c. 63), and the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64). See also the Companies Clauses Consolidation Acts, 1845, 1888, and 1889 (8 & 9 Vict. c. 16; 51 & 52 Vict. c. 48, and 52 & 53 Vict. c. 37), and the Rules and Orders for the time being in force under all these above Acts.

Railway and
similar
companies.

Railway and similar companies are chiefly governed by the Companies Clauses Consolidation Acts, 1845, 1888, and 1889, and the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); and see as to railway companies, the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), the Railway and Canal Traffic (Provisional Orders) Amendment Act, 1891 (54 Vict. c. 12); and see also the Rules and Orders for the time being in force under all these Acts.

As to banking and other companies entitled to sue and be sued by a public officer, see 7 Geo. 4, c. 46, as partially repealed by the Statute Law Revision Act, 1890; 1 & 2 Vict. c. 96, as partially repealed by the Statute Law Revision Act, 1874 (No. 2), and Statute Law Revision Act (No. 2), 1890; 7 & 8 Vict. c. 32; 7 & 8 Vict. c. 113, s. 47; and 27 & 28 Vict. c. 32; as also Rules of Supreme Court, 1883, Ord. XLII. r. 23.

Banking and other companies entitled to sue and be sued by public officer.

As to companies established by letters patent, see 7 Will. 4 & 1 Vict. c. 73, as partially repealed by the Statute Law Revision Act, 1874, the Statute Law Revision Act (No. 2), 1888, and the Statute Law Revision Act (No. 2), 1890.

Companies established by letters patent.

Effect of Registration of Companies.

Registration under the Companies Act, 1862 (Part VII.), does not affect obligations incurred previously to registration. Companies Act, 1862, s. 194. And by sect. 195 of that Act, provision is made for the continuation of all such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of such part (Part VII.) of the 1862 Act, have been commenced by or against such company, or the public officer or any member thereof, "in the same manner as if such registration had not taken place; nevertheless, execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company."

Not to affect obligations incurred previously.

Continuation of existing actions.

Execution not to issue against effects of individual members.

What may be Sequestered and Taken in Execution.

The property of a company may be sequestered for contempt or disobedience to a judgment or order, and the directors and other officers may be attached and their property sequestered (Ord. XLII. r. 31); but the company cannot be attached for contempt.

Property may be sequestered and directors attached.

Assets and effects may be taken in execution.

Execution is issued against companies under the Companies Acts, 1862 to 1890, and their assets and effects are taken in the usual way, but the uncalled-up capital can only be reached by means of a winding-up.

Exception as to railway rolling stock and plant.

With regard, however, to railway companies, the following provision is made for the protection from execution of railway rolling stock and plant by the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4, viz.: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purpose of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act, and before the 1st day of September, 1868, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act." The judgment creditor may, however, obtain the ap-

Appointment of receiver.

pointment of a receiver in manner therein mentioned. *Id.* And by sect. 3, "The term 'company' means a railway company; that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose)." Provision is, moreover, made by sect. 5 of the same Act for the determination of questions respecting executions against a railway company's property. By *Midland Waggon Co. v. Potteries, Shrewsbury and North Wales Rail. Co.*, 6 Q. B. D. 36; 50 L. J. Q. B. 6, such statutory protection from seizure under execution of a railway company's rolling stock and plant was held to extend to that of a company whose railway is closed for traffic and may never be re-opened. And see *Great Northern Rail. Co. v. Tahourdin*, 13 Q. B. D. 320; 53 L. J. Q. B. 69; *In re Manchester and Milford Rail. Co.*, 14 Ch. D. 645; 49 L. J. Ch. 365; and *In re Birmingham and Litchfield Rail. Co.*, 18 Ch. D. 155; 50 L. J. Ch. 594; and as to plant for formation of railway, see *Beeston v. Marriott*, 4 Giff. 436; 9 Jur. N. S. 960; 8 L. T. 690.

Statutory Provisions for Protection of Creditors.

There are certain statutory provisions for protection of creditors in the case of limited companies under the Companies Act, 1862, Part III., sects. 39 to 61 inclusive, and Part II., sects. 25, 26, 27, 32 and 33, of which provisions that of sect. 43 relating to the register of mortgages and charges specifically affecting the property of limited companies is essentially applicable to a work of this description. By that section (43), "Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting the property of the company, and shall enter in such register in respect of each mortgage or charge, a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge; if any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company, who knowingly and wilfully authorizes or permits the omission of such entry, shall incur a penalty not exceeding fifty pounds; the register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorizing or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries in the case of companies subject to its jurisdiction, may by order compel an immediate inspection of the register." As to the operation of this section, see *Re General Horticultural Co., Ltd., Whitehouse's Claim* (No. 2), 53 L. T. 699; *Wright v. Horton*, 12 App. Cas. 371; 56 L. J. Ch. 873; and *In re Underbank Mills Cotton Spinning and Manufacturing Co.*, 31 Ch. D. 226; 55 L. J. Ch. 255.

Limited company to keep register of mortgages and charges.

Penalty for not entering mortgages, &c.

Register may be inspected by creditor, &c.

Penalty on refusing inspection.

Adverse Claims.

With regard to adverse claims, see under incident titles; in particular as to debentures under title "Bills of Sale (Debentures)," *post*, p. 314.

Stay of Proceedings under Winding-up of Companies.

Winding-up
of companies.

With regard to the winding up of companies, such is regulated by the Companies Act, 1862, Part IV., sects. 74 to 173 inclusive (as partially repealed by the Companies Winding-up Act, 1890, *infra*), and Part VIII., sects. 199 to 204 inclusive, the Companies Act (1862) Amendment Act (30 & 31 Vict. c. 131), sects. 40 to 46 inclusive (as partially repealed by the Companies Winding-up Act, 1890), the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), the Companies Winding-up Acts, 1890 and 1893 (53 & 54 Vict. c. 63, and 56 & 57 Vict. c. 58), and as to Railway Companies, the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), sects. 6 to 22 inclusive (arrangements with creditors), and sects. 31 to 35 inclusive (abandonment), and by the rules and orders for the time being in force under these various Acts.

When Court
may restrain
further pro-
ceedings in
any action,
&c.

“The Court may (*inter alia*) at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit.” Companies Act, 1862, s. 85.

Actions, &c.
to be stayed
after order for
winding up.

“When an order has been made for winding up a company under this (1862) Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose.” *Ib.* s. 87.

Court may
stay pro-
ceedings for
winding up
after order.

“The Court may at any time after an order has been made for winding up a company, upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit.” *Ib.* s. 89.

Like provision is made by sections 197 and 198 in the case of the winding up of companies registered in pursuance of Part VII. of the above (1862) Act, and by sections 201 and 202 in the case of the winding up of unregistered companies. And as to staying proceedings, see Judicature Act, 1875, s. 24, sub-s. 5.

Certain at-

To continue, by section 163 of the Companies Act, 1862,

“Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents.” And see *Ex parte Fourdrinier, In re Artistic Colour Printing Co.*, 21 Ch. D. 510; *In re The Opera*, 62 L. T. 859; 38 W. R. 637. This 163rd section is, however, qualified by sect. 87. *In re Bank of Hindustan, China and Japan, Ex parte Lerick*, L. R. 5 Eq. 69; *In re London and Devon Biscuit Co.*, L. R. 12 Eq. 190; 40 L. J. Ch. 574; *In re London Cotton Co.*, L. R. 2 Eq. 53; *Smith, Fleming & Co.’s Case*, L. R. 1 Ch. 538; and *In re Vron Colliery Co.*, 20 Ch. D. 442; 51 L. J. Ch. 389. Moreover, the words “put in force” in such section mean when execution is actually levied, not when the writ is put into the hands of the sheriff, but when the sheriff by virtue of the writ enters into possession. Accordingly, if an execution be so put in force after the commencement of the company’s winding-up, it is void, subject only to the exercise of the Court’s discretionary power in the execution creditor’s favour, and which power will, it seems, only be exercised under exceptional circumstances. *In re London and Devon Biscuit Co.*, *supra*; and *In re Artistic Colour Printing Co., Ex parte Fourdrinier, supra*. See, moreover, *Ex parte Parry, In re Great Ship Co.*, 10 Jur. N. S. 3; 33 L. J. Ch. 245; *In re London Cotton Co.*, L. R. 2 Eq. 53; and *In re Thurso Gas Co.*, 42 Ch. D. 486; 61 L. T. 351.

But the presentation of a petition to wind up a company is no ground for restraining a sale by the sheriff of property of the company then already seized under an execution. *Ex parte Milwood Colliery Co.*, 24 W. R. 898. See also *In re Great Ship Co., supra*. Such a sale is, nevertheless, a proceeding within the 87th section of the Act, and will be restrained, if the Court has reason to doubt the *bona fides* of the transaction. *In re Perkins’ Beach Lead Co.*, 7 Ch. D. 371 (a). See also *In re Hill Pottery Co.*, L. R. 1 Eq. 649 (b); *In re Plas-yn-Mhowys Coal Co.*, L. R. 4 Eq. 689 (b); *In re Silver Hill Mining Co.*, 27 Sol. Jour. 615; *In re Bank of Hindustan, China and Japan, Ex parte Lerick, supra*; and *In re Bastow & Co.*, L. R. 4 Eq. 681 (c). See

attachments,
sequestra-
tions, and
executions to
be void.

Sheriff not
restrained
from selling
property al-
ready seized,

unless Court
doubts *bona
fides* of trans-
action.

(a) Disapproved, however, in *In re Artistic Colour Printing Co.*, 21 Ch. D. 510.

(b) Not however followed in *Ex parte Milwood Colliery Co.*, 24 W. R. 898.

(c) But questioned in *In re The Vron Colliery Co.*, 20 Ch. D. 442.

also as to sections 85 and 163, *In re Vron Colliery Co.*, *ante*; and as to staying proceedings under sect. 87, *California Redwood Co. v. Walker*, 13 C. of S. Ca. 4th Series, 810; *Graham v. Edge*, 20 Q. B. D. 683; 57 L. J. Q. B. 406; *In re Pontypridd and Rhonda Valley Tramways Co.*, 58 L. J. Ch. 536; 37 W. R. 570; and *In re North Carolina Estate Co.*, W. N. (1889) 53; 5 T. L. R. 328. According to Chadwick Healy on Company Law, when the sheriff is not in possession at the commencement of the winding up, the Court will interfere much more readily; and the cases show that it will prevent execution from being levied, unless some good reason to the contrary can be shown. On the other hand, Sir R. Malins, V.-C., in the course of his judgment in *Re Dimson's Estate Fire Clay Co.*, L. R. 19 Eq. 202, says:—"The object of the Companies Acts is that there shall be an equal distribution of the assets amongst all the creditors of a company, but in any case where there has been an attempt unjustly to wind up a company for the purpose of defeating creditors, then the Court has said that any particular creditor who has been unjustly treated shall be at liberty to pursue the remedy in his hands notwithstanding the order for winding-up"; and in this connection see *In re Imperial Steam and Household Coal Co.*, 18 L. T. 390; 16 W. R. 689; 37 L. J. Ch. 517; and *In re Universal Disinfector Co.*, L. R. 20 Eq. 162.

Part IV. of Companies Act, 1862, with exceptions, applies to winding up of unregistered company.

It was held by the Court of Appeal in *Rudow v. Great Britain Mutual Life Assurance Society*, 17 Ch. D. 600, that (whilst in that case the Court ought not for certain special reasons to exercise its discretionary power in the company's favour) where proceedings are pending for winding up an unregistered company all the provisions of Part IV. of the Companies Act, 1862, other than those expressly excepted, are applicable (*d*), and that under sect. 85, the Court had jurisdiction to make the order asked for, the direction in sect. 204 of the Act that "an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act" not being intended to confine the application of the Act to a company which has been actually ordered to be wound up. Jessel, M. R., said: "Now, under the Companies Act, 1862, s. 85, it

(*d*) Such reference to Part IV. of the Companies Act, 1862, will now be read with due regard to the qualification of such Part IV. by the Companies Winding-up Act, 1890; but which it will be observed does not affect the particular sections of the 1862 Act under consideration.

clearly is not obligatory on the Court to make the order, but the Court has a discretion which has been repeatedly exercised."

Under a voluntary winding-up the Court has jurisdiction to stay actions by creditors against the company. *Re Keynsham Co.*, 33 Beav. 123; and see *Re Life Association of England*, 34 L. J. Ch. 64. Moreover, where the goods of a company have been taken in execution after the passing of the resolution for voluntary winding-up, the Court has jurisdiction to stay further proceedings on the execution. *Westbury v. Twigg & Co.*, [1892] 1 Q. B. 77; 61 L. J. Q. B. 32. Moreover, under sects. 89 and 138 of the Companies Act, 1862, the Court has jurisdiction, on the petition of the liquidator in a voluntary liquidation, to stay all proceedings in the winding-up, with a view to the reconstruction of the company, where it is satisfied as to the assent of the creditors. *In re Steamship Titian Co.*, 58 L. T. 178; 36 W. R. 347.

Court's jurisdiction under voluntary winding-up to stay actions, &c.

It was held on appeal in *Re Withernsea Brickworks*, 16 Ch. D. 337; 50 L. J. Ch. 185, that sect. 87 of the Bankruptcy Act, 1869, which deprives execution creditors of the fruits of the execution where the sheriff has notice of a bankruptcy within fourteen days after sale, is not made applicable to the winding up of companies by the Judicature Act, 1875, s. 10 (*In re Printing and Numerical Registering Co.*, 8 Ch. D. 535, overruled); and it is conceived that the principle of this decision will be equally applicable to sect. 46, sub-sect. 2, of the Bankruptcy Act, 1883.

Sect. 87 of Bankruptcy Act, 1869, not to apply to winding-up of companies.

By 30 & 31 Vict. c. 127, ss. 7, 9, provision is made for the stay of actions and executions, &c., in the case of arrangements by railway companies with their creditors. And see as to staying proceedings, *In re Richards & Co.*, 11 Ch. D. 676; *Devas v. East and West India Dock Co.*, 58 L. J. Ch. 522; 61 L. T. 217; and *Sterens v. Mid Hants Rail. Co.*, *London Financial Association v. Stevens*, L. R. 8 Ch. 1064; 42 L. J. Ch. 694.

Stay of actions, &c. in case of arrangements.

As to commencement of winding-up by the Court, "a winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up." The Companies Act, 1862, s. 84; and see *Kent v. Freehold Land and Brickmaking Co.*, L. R. 3 Ch. 493, 494; *In re United Service Co.*, L. R. 7 Eq. 76; and *In re Taurine Co.*, 25 Ch. D. 118. As to commencement of the winding-up in the case of life assurance companies, see 35 & 36 Vict. c. 41, s. 4. As to commencement of winding-up under supervision, see *In re Smith, Knight & Co.*,

Commencement of winding-up—by Court;

of life assurance companies; under supervision;

voluntary.

Weston's Case, L. R. 4 Ch. 20; *Hodgkinson v. Kelly*, L. R. 6 Eq. 496, 499; *In re Colonial Trusts Corporation*, *Ex parte Bradshaw*, 15 Ch. D. 465; *In re Emperor Life Assurance Society*, 31 Ch. D. 78; 55 L. J. Ch. 3; *In re Imperial Land Co. of Marseilles*, *Ex parte Colborne and Strachbridge*, L. R. 11 Eq. 478; *In re Manchester Economic Building Society*, 24 Ch. D. 488; and *In re Taurine Co.*, *supra*. As to commencement of voluntary winding-up, "a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up." The Companies Act, 1862, s. 130; and see hereon *Thomas v. Patent Lionite Manufacturing Co.*, 17 Ch. D. 250; 50 L. J. Ch. 544; 44 L. T. 392; *In re Emperor Life Assurance Society*, *ante*; *In re West Cumberland Iron and Steel Co.*, 40 Ch. D. 361; 58 L. J. Ch. 373 (*In re Colonial Trusts Corporation*, *supra*, not followed); and *In re Dry Docks Corporation of London, Limited*, 58 L. J. Ch. (App.) 33.

Execution against Shareholders.

The Act of 1862 does not give creditors any direct right against the members by *scire facias* or otherwise.

With regard to the statutory provision (*per* Common Law Procedure Act, 1854, sect. 132) for writs of *scire facias* against, *inter alia*, members of a joint stock company or other body, upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself, a new mode of procedure is expressly provided by the present rules.

Leave to issue execution against shareholders.

By R. of S. C. 1883, Ord. XLII. r. 23 (*inter alia*): Where a party is entitled to execution against any of the shareholders of a joint-stock company upon a judgment recorded against such company, or against a public officer or other person representing such company, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just. And according to the

Annual Practice, 1894, p. 802, a party entitled to execution against shareholders of a joint-stock company on a judgment against a company may, where the company has no goods which may be taken, apply, under r. 23 of Ord. XLII., for leave to issue execution against individual shareholders. And see *Att.-Gen. v. Birmingham Drainage Board*, 17 Ch. D. 685. See also, in relation to execution against shareholders, the 1862 Act, sect. 195. As to execution against shareholders of railway and similar companies, see the Companies Clauses Consolidation Act, 1845, sects. 8, 9, and 36.

As to execution against shareholders in banking and other companies entitled to sue and be sued by a public officer, see 7 Geo. 4, c. 46, ss. 12 and 13, and Ord. XLII. r. 23, *supra*. A *scire facias* (e) (or now a summons under Ord. XLII. r. 23, *supra*) is the proper mode of proceeding against shareholders under the Banking Companies Act, 7 Geo. 4, c. 46. *Ransford v. Bosanquet*, 2 Q. B. 972; *Bosanquet v. Ransford*, 11 A. & E. 520; *Cross v. Law*, 6 M. & W. 217; and *Wittenburg v. Law*, 6 Bing. N. C. 345; see also 5th ed. Lind. 286; and *Hatwood v. Law*, 7 M. & W. 203.

Shareholders in banking companies, &c. entitled to sue and be sued by public officer.

And as to execution against shareholders in companies established by letters patent, see 7 Will. 4 & 1 Vict. c. 73, s. 24.

Shareholders in companies established by letters patent.

A judgment against a company, the shareholders of which are liable to execution on the judgment, may be executed against them although the creditor has issued an *elegit* against the company and has obtained partial satisfaction by an extent under the writ. 5th ed. Lind. 296; and see *Rigby v. Dublin Trunk Railway Co.*, L. R. 2 C. P. 586; *Ipscombe Railway Co. v. Lord Pollimore*, L. R. 3 C. P. 288; *Shrimpton v. Sidmouth Railway Co.*, L. R. 3 C. P. 80; *Lee v. Bude and Torrington Junction Railway Co.*, L. R. 6 C. P. 578; *Portal v. Emmens*, 1 C. P. D. 664; *Kipling v. Todd*, *Kipling v. Allan*, 3 C. P. D. 350 (*Portal v. Emmens*, distinguished); and *Mammatt v. Brett*, 54 L. T. 165 (*Kipling v. Todd*, *ante*, followed).

As to debentures, see under title "Bills of Sale (What constitutes a Bill of Sale)," *post*, p. 314.

Debentures.

(e) See under title "Writ of *Scire Facias*," *ante*, p. 224.

CHAPTER XX.

HUSBANDRY PROVISIONS : THEIR EFFECT UPON EXECUTION.

No sheriff,
&c. to sell, &c.
any straw, &c.
in any case,
nor any hay,
&c., contrary
to the cove-
nant.

By sect. 1 of 56 Geo. 3, c. 50, An Act to regulate the Sale of Farming Stock taken in Execution, "No sheriff or other officer in England or Wales shall, by virtue of any process of any court of law, carry off or sell or dispose of for the purpose of being carried off from any lands let to farm any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder or any turnips, or any manure, compost, ashes or seaweed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements, such sheriff or other officer shall have received a written notice before he shall have proceeded to sale."

Tenant to
give notice to
sheriff of
existence of
covenant;

By sects. 2 and 3, "The tenant or occupier of any lands let to farm, against whose goods any process of law shall issue, whereby such goods may be taken and sold, shall, on having knowledge of such process, give a written notice to the sheriff or other officer executing the same, of such covenants or agreements, whereof he or she shall have knowledge, and which may relate to and regulate, or are intended to regulate the use and expenditure of the crops or produce grown or growing thereon, and also of the name and residence of the owner or landlord of such lands; and such sheriff or other officer shall forthwith, on executing such process, and before any sale shall have been proceeded in, send a notice by the general post to the owner or landlord of such lands, in all cases where such owner or landlord shall be

and sheriff to
give notice to
owner or
landlord.

resident in any part of this United Kingdom, and shall have been made known to and ascertained by such sheriff or other officer, and also to the known steward or agent of such landlord or owner, in respect of such lands, stating to such owner, landlord and agent, the fact of possession having been taken of any crops or produce hereinbefore mentioned; and such sheriff or other officer shall, in all cases of the absence or silence of such landlord or owner, or his or her agent, postpone and delay the sale of such crops or produce until the latest day he lawfully can or may appoint for such sale; provided always that such sheriff or other officer executing such process may dispose of any crops or produce hereinbefore mentioned to any person or persons who shall agree in writing with such sheriff or other officer, in cases where no covenant or written agreement shall be shown, to use and expend the same on such lands, in such manner as shall accord with the custom of the county; and in cases where any covenant or written agreement shall be shown, then according to such covenants or written agreement; and after such sale or disposal so qualified, it shall be lawful for such person or persons to use all such necessary barns, stables, buildings, outhouses, yards and fields, for the purpose of consuming such crops or produce, as such sheriff or other officer shall allot or assign to them for that purpose, and which such tenant or occupier would have been entitled to and ought to have used for the like purpose on such lands."

Sheriff may dispose of produce subject to an agreement to expend it on the land.

By sect. 4, "Such sheriff or other officer shall, on the request of any landlord or owner who shall be aggrieved by any breach of such agreement, permit such landlord or owner to bring any action or actions in the name of such sheriff or other officer, for the recovery of damages in respect of such breach, such landlord or owner having nevertheless fully indemnified such sheriff or other officer against all costs whatsoever, and all loss and damage, before any such action shall be commenced."

Sheriff to permit landlord or owner to bring action in his name.

By sect. 5, "Such sheriff or other officer shall, before any sale of any crops or produce of any lands let to farm shall be proceeded in, make, by all ways and means, due inquiry within the parish where such lands shall be situate as to the name and residence of the landlord or owner of such lands."

Sheriff to inquire as to name and residence of landlord.

Landlords, by sect. 6, are not to distrain for rent on purchasers of crops severed from the soil, or other things sold subject to agreement.

Landlord not to distrain for rent on purchasers.

Sheriff not to
sell clover,
&c., growing
with corn.

Proviso for
contracts.

Sheriff not
liable for
damages,
unless for
wilful omis-
sion.

Indemnity to
sheriff, &c.,
acting under
provisions
of Act.

56 Geo. 3,
c. 50, does
not bind
Crown.

Sheriff must
sell goods,
&c., seized
under pre-
rogative
process, un-
conditionally.

Corn, &c.,
raised by
manual
labour may
be taken in
execution;

By sects. 7 and 8, "No sheriff or other officer shall, by virtue of any process whatsoever, sell or dispose of any clover, ryegrass or any artificial grass or grasses whatsoever, which shall be newly sown and be growing under any crop of standing corn, provided always that this Act shall not extend to any straw, turnips or other articles, which the tenant may remove from the farm consistently with some contract in writing."

By sect. 9, "In every case where any action shall be brought against such sheriff or other officer, for any breach of or omission of compliance with the provisions of this Act, no plaintiff shall be entitled to recover any damages against such sheriff or other officer, unless it shall be proved on the trial of such action that such breach or omission was wilful on the part of such sheriff or other officer."

By sect. 10, "No sheriff or under-sheriff, nor any or either of their deputies, agents, bailiffs or servants, nor any person or persons who shall purchase any hay, straw, chaff, turnips, grass or grasses, or other produce hereinbefore mentioned, under the provisions of this Act, nor his, her or their servant or servants, shall be deemed or taken to be a trespasser by reason of his, her or their coming upon or remaining in possession of any barns or other buildings, yards or fields, for the purpose of threshing out or consuming any straw, hay, turnips or other produce hereinbefore mentioned, under the provisions of this Act, or for doing any matter or thing whatsoever, fit and necessary to be done for the purpose of executing the same, and carrying into effect all stipulations contained in any agreement made under such provisions, though such acts shall have been done by such sheriff or other officer, and by such person or persons, his, her or their servants, after the return of the process under which such sheriff or other officer shall have acted."

This statute (56 Geo. 3, c. 50), although passed for the purpose of general good and public benefit in promoting good husbandry, does not extend to bind the Crown; therefore sales of goods seized under prerogative process are not within it, and the sheriff must sell unconditionally, nor can the sheriff sell crops as subject to tithes; he must sell without any qualification. *Ree v. Osbourne*, 6 Price, 94.

Corn, &c. raised by manual labour may be taken, and this may be effected by plucking an ear of corn. On the other hand things yielding no annual profit or which are produced irrespec-

tive of manual labour cannot be taken. 2 Gilb. Ex. 19. Cut grass cannot be taken as against a prior purchaser thereof from the execution debtor. *Tompkinson v. Russell*, 9 Price, 287. Growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *fi. fa.*; it goes to the heir and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels by reason of their being raised by labour and manurance. They go to the executor of the tenant in fee simple, although they are fixed to the freehold and may be taken in execution under a *fi. fa.* Nor can growing fruit be seized thereunder, the same belonging to the freehold and going to the heir. *Per* Bayley, J., in *Evans v. Roberts*, 5 B. & C. 832, 835.

but not cut grass against prior purchaser;

nor growing grass.

Growing potatoes may be taken;

but not growing fruit.

“In case all or any part of the growing crops of the tenant of any farm or lands shall be seized or sold by any sheriff or other officer by virtue of any writ of *fi. facias* or other writ of execution, such crops, so long as the same shall remain on the farm or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by such sheriff or other officer.” 14 & 15 Vict. c. 25, s. 2.

Growing crops seized and sold under execution to be liable for accruing rent.

The law regulating emblements is that a tenant is entitled to a crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may in extraordinary seasons be delayed beyond that period. Hops, so far as relates to their annual product, fall within the above rule. But there is no authority to show that things which take more than a year to arrive at maturity are capable of being emblements, except the case of *Kingsbury v. Collins*, 4 Bing. 202, where “teazles” were held to be so. *Per* Denman, C. J., in *Graves v. Weld*, 5 B. & Ad. 105; 2 L. J. (N. S.) K. B. 176. But now, “where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the

Rights as to emblements

altered by 14 & 15 Vict. c. 25, s. 1.

Tenant entitled to occupy until

expiration of
current year.

then current year of his tenancy." 14 & 15 Vict. c. 25, s. 1.
This Act applies to all tenancies in respect of which there might
be a claim to emblements.

Rights as to
away-going
crops on ex-
piration of
tenancy.

As to rights in relation to away-going crops and to straw and
hay on the land at the expiration of the tenancy, the reader is
referred for any necessary information thereon to Addison on
Contracts and Chitty on Contracts.

CHAPTER XXI.

FIXTURES AND EXECUTION THEREON.

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Introductory.

THE term "fixtures" in its general sense means any annexation or addition which has been affixed to or planted in the soil, *quicquid plantatur solo, cedit solo*. But it has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them. *Per* Parke, B., in *Hallen v. Runder*, 1 C. M. & R. 274. Fixtures defined.

The question as to what constitutes annexation is one of some difficulty and depends very largely upon the circumstances of the case. Mere juxtaposition is not sufficient, even though the thing placed on the ground be of great size and weight. Nor will a slight fastening necessarily imply that a thing is a fixture. From the quotations from judgments below and the cases cited under the different headings of this chapter, it may be gathered that annexation sufficient to render an article a fixture demands in each case the consideration of the two questions of degree and object to enable a satisfactory conclusion to be arrived at. What constitutes annexation.

The law is thus briefly explained by Parke, B., in *Hollarell v. Eastwood*, 6 Ex. 312: "The only question, therefore, is whether the machines when fixed were parcel of the freehold, and this is a question of fact, depending on the circumstances of each case, and principally on two considerations; first, the mode

of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causâ*, or in that of the Year Book, *pour un profit del inheritance* [20 Hen. 7, 13], or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel."

In the case of *Holland v. Hodgson*, L. R. 7 C. P. 328, Blackburn, J., thus expresses himself: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in *Wilde v. Waters* [16 C. B. 637; 24 L. J. C. P. 193]. This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus. In some cases, such as the anchor of the ship or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures, which are put up with the intention that they should be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord), have always been considered as part of the land, though severable by the tenant. In most, if not all, of such cases, the reason why the articles are considered fixtures is probably that indicated by Wood, V. C., in *Boyd v. Shorrocks* [L. R. 5 Eq. 78], that the tenant indicates by the mode in which he puts them up that he regards them as attached to the property during his interest in the property."

In *Wansbrough v. Maton*, 4 Ad. & E. 884, it was held that a tenant was entitled, at the end of his term, to remove a wooden barn erected by him on a brick and stone foundation, let into the ground, the barn however resting thereon merely by weight. *Per Coleridge, J.*, at p. 889: "In the absence of exception by custom, or in favour of trade, the rule is clear. The tenant has no right to remove the whole or any part of what is fixed to the freehold. The question therefore is, what is fixed? That is, in the present case, what does the barn consist of? Does it include the stone caps, or merely the woodwork? I apprehend that the woodwork is the whole barn. That wooden barn is supported by mere pressure. And this meets the argument suggested, as to the criterion being whether one part of the building be erected with a view to the other."

The reader is also referred to the judgment in the case of *Elliott v. Bishop*, quoted below under the head of "Fixtures between Landlord and Tenant."

The right of severance and removal differs according to the relative position in which the owner of the freehold and the person who has annexed may stand. As between heir and executor, as between the tenant for life or in tail and the remainderman or reversioner, and as between mortgagor and mortgagee, the old rule that whatever is attached to the soil becomes part thereof, *quicquid plantatur solo, cedit solo*, is still applied (*Holland v. Hodgson*, L. R. 7 C. P. 328; *Climie v. Wood*, L. R. 3 Ex. 257; *Longbottom v. Berry*, L. R. 5 Q. B. 123, 137; *Mather v. Fraser*, 2 K. & J. 536; 25 L. J. Ch. 361; and *Fisher v. Dixon*, 12 C. & F. 312), whilst as between landlord and tenant such rule has, in the absence of contract or any contrary custom, and under certain conditions, been relaxed in the tenant's favour in respect of trade and domestic or ornamental fixtures. *Hellawell v. Eastwood*, 6 Ex. 295; 20 L. J. Ex. 154; *Elliott v. Bishop*, 10 Ex. 496; *Holland v. Hodgson*, *supra*; *Winn v. Ingilby*, 5 B. & Ald. 625; and *Place v. Fagg*, 4 M. & R. 277. But until the Agricultural Holdings Acts, *infra*, no such indulgence extended to agricultural fixtures. The law is thus stated by Lord Ellenborough in the leading case of *Elwes v. Maw*, 3 East, 38, 51: "Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons. First, between different descriptions of representatives of the same owner of the inheritance, viz., between his heir and executor. In this first case, *i.e.*, as between heir and executor, the

Right of removal differs according to relative position of owner of freehold and person annexing.

rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto. Secondly, between the executors of the tenant for life or in tail and the remainderman or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case between landlord and tenant. But the general rule on this subject is that which obtains in the first mentioned case, *i.e.*, between heir and executor; and that rule is, that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favour of trade and of those vessels and utensils which are immediately subservient to the purposes of trade."

In what cases
sheriff may
seize fixtures
in execution.

The sheriff under a writ of *fi. facias* or other similar process cannot take in an execution against the owner of the freehold things affixed to the freehold and which would go to the heir and not to the executor. *Winn v. Ingilby*, 5 B. & Ald. 625; 1 D. & R. 247; *Mather v. Fraser*, 2 K. & J. at p. 550; *Scorell v. Boxall*, 1 Y. & J. per Hullock, B., at p. 398. The question whether he can take things in execution against a life tenant which the executor of the life tenant is entitled to as against remaindermen or reversioners does not seem to have been directly judicially considered, but the tendency of the decisions seems to point to the conclusion that the sheriff can take such things in execution. In the case of a tenant, the sheriff may seize any fixtures which the tenant may remove as against his landlord, and he may also seize any interest that the tenant may have in any fixtures which are the subject of the demise for his term. But it must be borne in mind that in the absence of any contract such right is limited to the duration of the tenancy or to such further period of possession by the tenant as he may hold the premises under a right to still consider himself tenant. *Weeton v. Woodcock*, 7 M. & W. 14; and see *In re Lavies, Ex parte Stephens & Co.*, 7 Ch. D. 127; 47 L. J. Bk. 22; and *Pugh v. Arton*, L. R. 8 Eq. 628. This right of seizure on the part of

the sheriff was first recognized in relation to trade fixtures (*Poole's Case*, 1 Salk. 368); and some doubt was subsequently expressed as to whether other species of fixtures were equally liable. But now it is clear that all fixtures of whatever nature, over which the person proceeded against has a right, may be taken (*Place v. Fagg*, 4 M. & R. 277; *Minshall v. Lloyd*, 2 M. & W. *per* Parke, B. at p. 459), with the exception, perhaps, of fixtures of considerable magnitude, such as a windmill, resting on but not annexed to the ground. *Steward v. Lombe*, 1 Brod. & B. 506, 512.

But as the right of a sheriff to sever and remove fixtures is only equal to that of the person on whom he levies an execution, he cannot seize as chattels things which a tenant has precluded himself from removing. *Dumergue v. Rumsey*, 2 H. & C. 777; 33 L. J. Ex. 88; *R. v. Topping*, M'Cle. & Y. 544; *Richardson v. Ardley*, 38 L. J. Ch. 508; *Duke of Beaufort v. Bates*, 3 De G. F. & J. 381; 6 L. T. 82; 8 Jur. N. S. 270. Such fixtures, however, if expressly the subject of a demise may be seized together with the premises for the lessee's interest in them, though not as divided chattels separate from the freehold. *Ryall v. Rolle*, 1 Atk. 165; *Gordon v. Harper*, 7 T. R. 11, 12.

The sheriff must separate and sell fixtures over which he has a right of severance, apart from the leasehold, if he cannot sell them together. *Barnard v. Leigh*, 1 Stark. 43.

The sheriff cannot seize articles which have been fixtures and which the tenant has unlawfully severed; so in *Farrant v. Thompson*, 5 B. & Ald. 826, where a mill with mill machinery was demised for a term and the tenant without leave severed the machinery, it was held that the property in the machinery reverted to the landlord and could not be taken under a *fi. fa.* See also *Richardson v. Ardley*, 38 L. J. Ch. 508.

Section 146 of the Bankruptcy Act, 1883 (46 & 47 Viet. c. 52), provides that a sheriff shall not under a writ of *elegit* deliver the goods of a debtor nor shall a writ of *elegit* extend to goods. As fixtures until severance remain part of the land, so it seems that a sheriff in executing a writ of *elegit* may deliver fixtures, which are not goods within the meaning of the Act, goods being defined in section 168 as "all personal chattels."

Right of sheriff to sever only equal to that of judgment debtor.

When sheriff must sell fixtures separately.

Sheriff cannot seize fixtures unlawfully severed by tenant.

Sheriff, in executing a writ of *elegit*, may deliver fixtures.

Fixtures between Landlord and Tenant.

As has already been pointed out, greater indulgence is shown to the tenant in the matter of severing and removing fixtures than to any other kind of occupier. For reasons of public policy and convenience, and for the furtherance of trade this greater latitude has arisen, and now a tenant is entitled during the continuance of his term and such period after as agreement with his landlord permits, to sever and remove certain classes of fixtures, viz., trade fixtures, and fixtures put up for ornament or domestic use. But this right of severance and removal may be modified by the terms of the lease, or the tenant may have entirely precluded himself from exercising the rights which his position as such entitles him to. The reader is referred to the notes on the case of *Elwes v. Maw*, 9th ed. Sm. L. C. Vol. II. p. 182, to Woodfall's Landlord and Tenant, and to Amos and Ferard on Fixtures (especially Appendix B), for a detailed account of the relations of landlord and tenant with regard to fixtures, as it is beyond the scope of this work to deal with such a subject at length.

Removal of
trade fixtures
by tenant.

The history of the right to remove trade fixtures is traced in *Elwes v. Maw*, and the cases on the subject are numerous. The modern view of the law is thus laid down by Martin, B., in the case of *Elliott v. Bishop*, 10 Ex. 496. "As society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and of deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation, became apparent to all; and there long ago sprang up a right, sanctioned and supported both by the Courts of law and equity, in a temporary owner or occupier of real property or his representative, to disannex and remove certain articles, although annexed by him to the freehold, and these articles have been denominated 'fixtures'; and the best definition with which I am acquainted is that given in the judgment of this Court in *Hallen v. Runder* [1 C. M. & R. 266], viz., that they are articles which were originally personal chattels, and which, although they have been annexed to the freehold by a temporary occupier, are nevertheless removeable, and of course saleable, at the will of the person who has annexed them. The term, however, does not include everything which is fixed, and so rendered immovable. The object

and purpose of the annexation in fixing must be looked at ; and if a chattel be fixed to the building merely for the more complete enjoyment and user of it as a chattel, it is not a fixture at all in the technical legal meaning of the word, but still remains a chattel. Upon this principle, it was decided, in the case of *Hellawell v. Eastwood* [6 Ex. 295], that cotton-spinning machines, screwed into and fixed firmly to the floor, were chattels and distrainable for rent. From the above explanation of the term 'fixtures,' it is obvious that the expression 'landlord's fixtures' is a most inaccurate one. All the materials of a house are, before they are fixed, chattels. The bricks, the mortar, the timber, the iron, and all the other materials of a house were originally mere personal chattels ; and there can be no doubt, that, if the landlord builds a house, and puts in for the purpose of completing the house, for instance, chimney-pieces, grates, stoves, bells, &c., which are in the house when let to the tenant, they all remain the property of the landlord, and are part of the house, and are only to be enjoyed by the tenant during the term, and are not removable by him at all, any more than the walls or roofing or flooring. It seems, therefore, inaccurate to apply the term fixtures to anything which belongs to the landlord ; but probably what is meant by the term 'landlord's fixtures' are such articles as, when once annexed by the tenant, cannot be disannexed or removed by him ; and it is in this sense I understand the term to have been used by the learned counsel for the plaintiff. There is no doubt, as was stated by him in his argument, that where there is a covenant in the lease in regard to the fixtures, the right of the parties in respect of them must be regulated by the covenant ; and his contention was, that, upon the true construction of the covenants in the present case, the tenant would be entitled to remove every fixture, which, by the general rule of law as between landlord and tenant, independent of all contract or covenant, he would have a right to remove. . . . Where a tenant covenants to deliver up 'marble and other chimney-pieces, and all other fixtures and articles in the nature of fixtures, which shall at any time during the term be fixed or fastened to the premises,' he must leave all fixtures which are annexed for the occupation and enjoyment as a house ; for instance, grates or stoves built in the usual way, bells, the wires of which are inserted in the walls, presses fixed for the more convenient use of the individuals inhabiting the house, whoever they may be—in short, all fixtures which render the house more convenient

and habitable as a house ; and, assuming that the articles denominated tenant's fixtures in this case are of this character (which I have no doubt they are), in my opinion the tenant under the lease would have no title to or right to sell or remove them, but that they would belong to the landlord, and the tenant removing them would be liable to an action at the suit of the Marquis of Camden ; and that, therefore, as to the value of these articles, the defendant is entitled to our judgment. As to the other description of fixtures, I think the plaintiff is entitled to recover their value. I assume them to be fixtures put up exclusively for the carrying on of the trade, or for ornamenting and beautifying the house as a public-house. In my opinion such fixtures are entirely out of the covenants, and the rights of the parties in respect of them are regulated by the general law. In the absence of contract, trade fixtures are clearly removable by the tenant, and he by sale may give a good title to the purchaser." See also the judgment of Platt, B. And see *per* Wood, V.-C., in *Mather v. Fraser*, *ante*, and especially his quotation of Lord Chancellor Cranworth's judgment in *Ex parte Barclay*, 5 De G. M. & G. 403.

In *Whitehead v. Bennett*, 27 L. J. Ch. 474—476, on a question between landlord and tenant as to trade fixtures, it was held, that the tenant could not remove buildings built of brick, with brick foundations let into the soil, although erected for the sole purpose of trade, although machinery, engines, vats, and utensils, with their accessories, might be removed. Kindersley, V.-C., in the course of his judgment, said : " Among the many cases upon this subject there is not one which has determined that, even in the most favourable circumstance of landlord and tenant, a tenant has a right to remove any building which he has erected, merely because it is used only for the purpose of trade ; and if the argument used in this case is allowed to prevail, it can only do so in such a manner as may be followed up to its legitimate consequences, and it would be laying down a rule that whatever a tradesman erected, however substantial, and however firmly let into the freehold, yet if the identity is preserved, the tenant might remove it. Such a rule is established nowhere. Not only is there no such decision, but there is not even a *dictum* that can bear any such construction. . . . No doubt great favour has been shown, and should always be shown, towards trade, and the modern cases have relaxed the rigour of the old authorities in this respect, but some limit must

be put to this indulgence, and the cases seem to me to have gone quite as far as they ought to go. The question, then, turns upon the nature of these particular buildings. With respect to that which is erected upon the walls forming a passage, it is incapable of being removed in an integral condition, and the same observation applies to the engine-house, although it may in some sense be called an accessory to the engine. But it is not a mere shed, on the contrary, it is a brick building let into the soil. Take the common case of those gigantic buildings which are raised storey after storey, fitted with spinning-jennies, drums, wheels, &c., which can only be used in such a building. It is clear, *ex concessis*, that you might remove the machinery, or the engine, however large, which is usually in the lower portion, and which works the whole machinery; but if the argument as to accessories were carried out, you might allow the entire building to be removed, and it is impossible to see where such a doctrine would stop. The present case is precisely the same on a smaller scale; and with respect to all and each of these buildings, my opinion is, that they cannot be brought within the proper legal definition of trade fixtures, removable by the tenant." And see *Wake v. Hall*, 8 App. Ca. 195; 48 L. T. 834. See, also, in relation to the right to take in execution rails laid down by a mining lessee, *Antrim (Earl) v. Dobbs*, 30 L. R. Ir. 424.

Fixtures for the purpose of ornament or convenience may be removed by the tenant at the expiration of his lease unless they are of such a nature as to be considered a permanent improvement, and their removal would materially damage the house or land to which they are affixed. On this subject, Dallas, C. J., in his judgment in the case of *Buckland v. Butterfield*, 2 Brod. & B. p. 58, says: "It is clear that many things of an ornamental nature may be in a degree fixed, and yet during the term may be removed; and it is equally clear that there may be that sort of fixing or annexation, which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney pieces, pier glasses, hangings, wainscot, fixed only by screws and the like." In the

Removal of fixtures for ornament or convenience by tenant.

above case, it was held that a conservatory erected on a brick foundation and attached to a dwelling-house, and communicating with it by windows opening into the conservatory, and a flue passing into the parlour chimney, becomes part of the freehold and cannot be removed by the tenant. See also *Grymes v. Boweron*, 6 Bing. 437.

Removal of agricultural fixtures by tenant.

Tenant may remove buildings, &c., erected on farms, unless landlord elect to take same.

Referring to agricultural fixtures, by sect. 3 of 14 & 15 Vict. c. 25 (an Act to improve the law of landlord and tenant in relation to, *inter alia*, tenants' fixtures), the tenant may remove farm or other buildings, engines or machinery (however affixed to the freehold, and notwithstanding they may consist of separate buildings) erected by him, either for agricultural purposes or for the purposes of trade and agriculture, at his own cost, with his landlord's previous written consent (and not under any obligation in that behalf), subject to any consequential injury to the landlord's land or buildings, or to the tenant otherwise putting such land or buildings into their original condition, and to his giving his landlord one calendar month's previous notice in writing of such intention, and to the latter's right of option to purchase such fixtures at a value to be ascertained by arbitration.

Removal of fixtures by tenant under Agricultural Holdings Act, 1883.

By sect. 34 of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), which section repealed and substantially reproduced a similar section in the Act of 1875 (38 & 39 Vict. c. 92), s. 53, "where after the commencement of this [1st January, 1884] Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture (*a*), or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable period after the termination of the tenancy, provided as follows:—

Provisoos.

Payment of rent.

"(1) Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding:

Removal to be careful.

"(2) In the removal of any fixture or building the tenant shall

(*a*) According to Woodfall on Landlord and Tenant, p. 672, ornamental but not trade fixtures are included in the expression "other fixtures."

not do any avoidable damage to any building or other part of the holding :

- “(3) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any building or other part of the holding by the removal : Tenant to make good damage.
- “(4) The tenant shall not remove any fixture or building without giving one month’s previous notice in writing to the landlord of the intention of the tenant to remove it : Notice of removal to landlord.
- “(5) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding ; and any difference as to the value shall be settled by a reference under this Act as in case of compensation (but without appeal).” Option of landlord to purchase on giving notice.

By sect. 54, “Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord.” Nature of holdings to which Act applies.

By sect. 60, “Except as in this Act expressed, nothing in this Act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exercisable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract, or of any improvements, waste emblements, tillages, away-going crops, fixtures, tax, rate, tithe rent-charge, rent, or other thing.” General saving of rights.

The restrictions on a tenant’s right of removal in these Acts must be carefully borne in mind, especially the necessity in every case of a month’s notice to the landlord being given. Wherever the Acts do not apply, the old common law rule laid down in *Elwes v. Maw*, 3 East, 38, still holds good and in such case the tenant has no right to remove fixtures erected by him for merely agricultural purposes.

Fixtures between Mortgagor and Mortgagee.

Articles fixed
to freehold by
nails, &c. pass
to mortgagee.

Supplementing the above general rule as between mortgagor and mortgagee, it may be generally taken that articles fixed to the freehold by nails, screws, solder, or any other permanent or quasi-permanent means, though merely for the more convenient user or for steadiment, pass with the freehold or leasehold and belong to the legal or equitable mortgagee of the property, even though such articles can be actually removed without any appreciable damage to the freehold. See *Ex parte Astbury, Re Richards*, L. R. 4 Ch. 630; *Climie v. Wood*, L. R. 3 Ex. 257; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Mather v. Fraser*, 2 K. & J. 536; 25 L. J. Ch. 361; and *Meux v. Jacob*, L. R. 7 H. L. 481; 44 L. J. Ch. 481. See also *Cross v. Barnes*, 46 L. J. Q. B. 479; 36 L. T. 693. It will be borne in mind that in considering these cases the principle of the cases relating to landlord and tenant, in which the strict law has been relaxed for the furtherance of trade, must be discarded.

Machinery,
&c. fixed to
freehold pass
to mortgagee.

In *Mather v. Fraser*, *supra*, manufacturers mortgaged the land, mills, or factories at which the business was carried on, and of which they were the absolute owners, together with the steam engine, steam boilers, mill, gear, millwright works and machinery then or thereafter to be fixed to the said land, hereditaments and premises, together with all out-offices, edifices, fixtures, &c. It was held, *inter alia*, that the mortgagees were entitled as against the assignees to all machinery fixed to the freehold.

Trade fixtures
annexed to
freehold pass
to mortgagee.

In *Climie v. Wood*, *supra*, Kelly, C. B., said: "The question, therefore is whether, as between mortgagor and mortgagee, trade fixtures are removable by the mortgagor . . . There have been several cases where the Courts have decided that, upon the true construction of the mortgage deeds, trade fixtures were removable by the mortgagor, but not one to show that such right exists without a special provision. A mortgage is a security or pledge for a debt, and it is not unreasonable if a fixture be annexed to land at the time of a mortgage, or if the mortgagor in possession afterwards annexes a fixture to it, that the fixtures shall be deemed an additional security for the debt, whether it be a trade fixture or a fixture of any other kind. It has already been observed that no authority has been cited to show that trade fixtures may be removed by the mortgagor, but there are several

to the contrary; and unless we are prepared to overrule them, our judgment must be adverse to the plaintiff. It is unnecessary to refer to cases earlier than *Ex parte Cotton* [2 M. D. & De G. 725]. The case was decided in the Court of Review in Bankruptcy. A brewery had been mortgaged, and afterwards new and additional trade fixtures had been erected by the mortgagor. He became bankrupt, and the mortgagee was held entitled to the new fixtures against the assignee; and Sir John Cross, in delivering judgment, said: 'By the general rule of law, fixtures belong to the premises to which they are affixed, as between mortgagor and mortgagee, without any such distinction as that of tenant's fixtures.' . . . The case of *Culwick v. Swindell* [L. R. 3 Eq. 249], was decided in 1866 by Lord Romilly. He stated that he would follow *Ex parte Cotton* [2 M. D. & De G. 725], and hold that fixtures, although trade fixtures, and put up for the purpose of carrying on the business, and although put up since the date of the mortgage, so far as they are affixed to the freehold, go with it to the mortgagee. This is a stronger case than the present, for here the trade fixtures were upon the freehold at the time of the mortgage, and all the authorities seem to show that they pass with the land. The result is that the old maxim of *Quicquid plantatur solo, solo cedit*, applies in all its integrity to the relation of mortgagor and mortgagee, and that trade fixtures constitute no exception. It follows from this that the findings of the jury, that the steam engine and boiler were fixed by the mortgagor for their better use, and not to improve the inheritance, and that they could be removed without any appreciable damage to the freehold, become immaterial, for the right of the mortgagee attaching by reason of the annexation to the land, the intention of the mortgagor in respect of them cannot prevail against the legal effect of the deed."

Moreover, everything which is a necessary or essential part of a trade fixture passes with the fixture. *Ex parte Astbury, In re Richards*, L. R. 4 Ch. 630. In this case, an iron manufacturer made an equitable mortgage of his rolling mills, of which he held a lease, and shortly afterwards became bankrupt. Besides the fixed machinery, the mills contained the following chattels used in the manufacture:—(1) A large number of duplicate iron rolls of various sizes, made to be fitted into the machine, and used for different sizes of iron; some of these were fitted to the machine, and had been used, and others had not yet been fitted. (2) Straightening plates, which were broad iron plates, embedded in the floor

Necessary or essential parts of trade fixture pass with fixture.

for straightening the iron when taken out of the furnace. (3) Weighing machines, which were deposited in holes dug in the earth and lined with brickwork, so that the weighing plate was level with the surface of the ground, but which were not fixed to the brickwork. It was here held on a case stated in the bankruptcy between the mortgagees and the assignees, first: that such of the rolls as had been fitted to the machine were fixtures, and passed to the mortgagees, but that such of the rolls as had not been fitted to it were not fixtures, and belonged to the assignees; secondly, that the straightening plates were fixtures, and passed to the mortgagees; and thirdly, that the weighing machines were not fixtures, and belonged to the assignees. *Metropolitan Counties Society v. Brown*, 26 Beav. 454, distinguished. Sir G. W. Giffard, L. J., thus stated the principle: "With respect to the law, it is admitted that where there is a mortgage of a manufactory, and part of the machinery used in it is a fixture, that part passes. We have, therefore, to determine what, according to the law, are, in a proper sense, fixtures. There are two *dicta* which will be sufficient to guide us for the present purpose. In *Mather v. Fraser* [2 K. & J. 536], it was decided that the article must be an essential part of the machine. I think that was all that was necessary to lay down in that case. The *dictum* of Lord Cottenham in *Fisher v. Dixon* [12 C. & F. 312] was that all 'belonging to the machine' would pass, and I should say in this case the proper test to lay down would be that the chattel must be 'something which belongs to the machine as part of it.'" He held also that the fact of the mortgagor being a leaseholder made no difference on this point. This decision was followed in *Longbottom v. Berry*, L. R. 5 Q. B. 123; and *Holland v. Hodgson*, L. R. 7 C. P. 328.

In absence of
contrary in-
tention, a
mortgage will
pass fixtures
to mortgagee.

Moreover, in the absence of an intention to the contrary being expressed in the mortgage deed, a mortgage whether of leasehold or of real estate will pass all fixtures to the mortgagee, notwithstanding that only some of the fixtures have been specified in the mortgage deed. When, however, the mortgage is by demise, the right to sever the fixtures remains in the mortgagor at the end of the mortgage term, but the mortgagee has the right to use them during that term. *The Southport and West Lancashire Banking Co. v. Thompson*, 37 Ch. D. 64; 57 L. J. Ch. 114 (the observations of Lord Blackburn (then Blackburn, J.) in *Hactry v. Butlin*, L. R. 8 Q. B. 290; 42 L. J. Q. B. 163, explained); and see the judgment of Cotton, L. J., in this case. So in the case of a mortgage of a dwelling-house

and premises and all fixtures therein, the intention of the parties, one in mortgaging, and the other in taking the security for the amount advanced, must be considered; and whatever is substantially part of the house, so that it cannot be taken away without depriving the house of what was intended to be used with the building, should be considered as fixtures. *Smith v. Maclure*, W. N. (1884), p. 14. Pearson, J., in that case said he considered that the cornices and poles were fixtures, but not the hangings and valances which were apart from the cornices; the pier glasses in frames were fixtures, and all the gas fittings and gaseliers, including the reading lamp, which was screwed to one particular pipe; but that the mantel boards which were not fixed would not be included as fixtures.

Necessary parts of mortgaged machinery, like leather driving belts, though readily removable, when such machinery is out of gear, pass to the mortgagee. *Sheffield and South Yorkshire Permanent Benefit Building Society v. Harrison*, 15 Q. B. D. 358; 54 L. J. Q. B. 15; 51 L. T. 649.

A tenant (under a mortgagor) of mortgaged premises, who has brought trade fixtures thereon, can remove the same as against both mortgagee and mortgagor, on the ground that, although between a mortgagor and mortgagee the latter is entitled to all fixtures upon the mortgaged premises at the time of the mortgage and which may be subsequently brought there by the mortgagor, such tenant is a stranger to the mortgage. *Sanders v. Davis*, 15 Q. B. D. 218; 54 L. J. Q. B. 576; but see *Watkins v. Land Securities Company*, W. N. (1885), 211 (C. A).

An attornment clause being merely an additional security, fixtures added by a mortgagor after the date of a mortgage containing an attornment clause have been held to pass to the mortgagee. *Ex parte Punnett, In re Kitchin*, 16 Ch. D. 226.

Fixtures were expressly mentioned in the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), sect. 7, as included in the expression "personal chattels." Under this Act, however, it was held that if the fixtures were included in the operative part of a conveyance, or an assignment of land, and no separate disposition for them apart from the land was provided for, no registration was necessary. *Mather v. Fraser*, 2 K. & J. 536; 25 L. J. Ch. 361; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Longbottom v. Berry*, L. R. 5 Q. B. 123, 137. And it is now enacted by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), sect. 4, that for

Necessary parts of mortgaged machinery pass to mortgagee.

Tenant of mortgaged premises may remove fixtures.

Fixtures added after date of mortgage, with attornment clause.

Fixtures conveyed, &c. with freeholds, &c. do not require registration,

the purposes of the Act "the expression 'personal chattels' shall not include [*inter alia*] fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed."

but if assigned separately, registration necessary.

But under the Bills of Sale Act, 1854, it was held that if the fixtures were assigned separately, or the deed comprised a power to dispose of them separately from the land, registration was required. *Waterfall v. Penistone*, 6 El. & Bl. 876; *Havtry v. Butlin*, L. R. 8 Q. B. 290; 42 L. J. Q. B. 163; *In re Eslick, Ex parte Alexander*, 4 Ch. D. 503; 46 L. J. Bank. 30; 25 W. R. 260. And now by the Bills of Sale Act, 1878, sect. 4, for the purposes of the Act, fixtures, when separately assigned or charged, are included in the expression "personal chattels," and therefore registration is necessary.

Definition of "trade machinery."

By sect. 5 of the Bills of Sale Act, 1878, "For the purposes of this Act, trade machinery means the machinery used in or attached to any factory or workshop;

Machinery excluded from the Act.

- 1st. Exclusive of the fixed motive powers, such as the water-wheels and steam engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive power; and,
- 2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose; and
- 3rd. Exclusive of the pipes for steam, gas and water, in the factory or workshop.

The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be "personal chattels" within the meaning of this Act.

Definition of "factory or workshop."

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say,

- (a) In or incidental to the making any article or part of an article; or
- (b) In or incidental to the altering, repairing, ornamenting, finishing, of any article; or
- (c) In or incidental to the adapting for sale any article.

Assignment of machinery excluded does

The effect of sect. 5 of the Bills of Sale Act, 1878, is that the articles which are thereby excluded from the definition of trade

machinery therein contained are not "personal chattels" within the meaning of the Act for any purpose whatever, and consequently any assignment of such articles does not require registration under the Act; and this applies to such articles though they are not actually affixed to the land with which they are assigned, but (by virtue of an easement) to other land belonging to a stranger. *Topham v. Greenside Glazed Fire Brick Co.*, 37 Ch. D. 281; 57 L. J. Ch. 583. not require registration.

By sect. 7 of the above (1878) Bills of Sale Act "no fixtures (*inter alia*) shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, without otherwise taking possession of or dealing with such land or building, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed is also conveyed or assigned to the same person or persons. The same rule of construction shall be applied to all deeds or instruments, including (*inter alia*) fixtures, executed before the commencement of this Act, and then subsisting and in force, in all questions arising (*inter alia*) in execution of any process of any Court, which shall be issued after the commencement of this Act." It has been held in *In re Armytage, Ex parte Moore*, 14 Ch. D. 379; 49 L. J. Bank. 60, that sect. 7 of the above (1878) Act is retrospective to the extent of giving a fixed legislative construction to the term "separately assigned or charged" as regards all deeds, whether executed since or before the commencement of that Act, but is not so for the purpose of extending to deeds executed before the commencement of the Act the wider meaning given to the term "chattels" by sects. 4 and 5. Fixtures not to be deemed separately assigned when land passes by same instrument.

An assignment of personal chattels within the application of the Bills of Sale Acts, together with fixtures not within their application, to secure one sum of money, may be valid as to the fixtures, notwithstanding that it is void as to the chattels. *In re Burdett, Ex parte Byrne*, 57 L. J., Q. B. 263. Assignment when valid as to fixtures although void as to chattels.

By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 6, "Nothing contained in the foregoing sections of this Act [*viz.*, sects. 4 and 5 of the 1882 Act mentioned below] shall render a bill of sale void in respect of any of the following things; that is to say, (*inter alia*) any fixtures separately assigned or charged, and any plant, or trade machinery, where such fixtures, plant, or trade machinery are used in, attached to, or Bills of sale of fixtures not to be void in certain cases.

brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale. By sects. 4 and 5 of the above Act every bill of sale shall be void except as against the grantor, in respect of any property not specifically described in the schedule attached thereto, and in respect of any property therein specifically described of which the grantor was not the true owner at the time of the execution of the bill of sale.

See also *In re Yates, Batcheldor v. Yates*, 38 Ch. D. 112; 57 L. J., Ch. 697; and see as to assignments of leaseholds with machinery *In re Lusty, Ex parte Lusty*, 60 L. T. 160; 37 W. R. 304; and in relation to a contract for the erection of trade machinery to be paid for by instalments, *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415; 61 L. J. Ch. 227; 66 L. T. 108; 40 W. R. 280. See also under title "Bills of Sale," *post*, p. 291.

Fixtures between Heir and Executor, Tenant for Life and Remainderman, and Tenant in Tail and Reversioner.

As between heir and executor fixtures pass to the heir.

In the case of *Fisher v. Dixon* (12 C. & F. 312), the absolute owner of land, for the purpose of better using that land, had erected upon and affixed to the freehold certain machinery, and it was held, that in the absence of any disposition by him of this machinery, it would go to the heir as part of the real estate; that if the *corpus* of such machinery belonged to the heir, all that belonged to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir; and that no distinction arose in the application of this rule, from the circumstance that the land did not descend to, but was purchased by, the owner. Lord Cottenham, in the course of his judgment, said: "Then the case being simply this, the absolute owner of the land, for the purpose of better using that land, having erected upon and affixed to the freehold, and used, for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, is there any authority for saying that, under these circumstances, the personal representative has a right to step in and

lay bare the land, and to take away all the machinery necessary for the enjoyment of the land? Let us consider for a moment, if that is the principle, to what extent is it to go? It is put by Lord Cockburn (and a very strong illustration it is), if the owner of the land should dig a well, and erect machinery for the purpose of using that well, is it competent to the personal representative to come and take away that machinery, and leave the well useless? He thinks it is not. Where is the distinction between the two cases? Such machinery is capable of being taken away with very little, if any, damage to the land. Although, therefore, machinery is, in its nature, generally personal property, yet, with regard to machinery, or a manufactory erected upon the freehold for the enjoyment of the freehold, nobody can suppose that that can be the rule of law; and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is a case of machinery erected for the better enjoyment of the land itself. The principle probably would go a great deal further, but it is more advisable to confine the observations I have to make to the particular circumstances of this case. There is no case whatever which has been cited in which that doctrine has been recognized, except the one which has been referred to (*The Cider Mill Case*), as to which we really know nothing, except that at the Worcester assizes, a good many years ago, a cider mill was held to belong to the personal estate. Why it was so held, under what circumstances, and whether it was a cider mill fixed to the freehold or not, we do not know. We know nothing except that this machine, called a cider mill, was decided to go to the personal representative. It is impossible to extract a rule of law from a case of which we know so little as that. And, with that exception, there is a uniform course of decisions, wherever the matter has been discussed, in favour of the right of the heir to machinery erected under the circumstances in the present case; and if the *corpus* of the machinery is to be held to belong to the heir, it is hardly necessary to say that we must hold that all belongs to that machinery, although more or less capable of being used in a detached state from it; still, if it belongs to the machinery, and belongs to the *corpus*, the article, whatever it may be, must necessarily follow the same principle, and remain attached to the freehold." *Per* Lord Brougham: "If a cider mill be fixed to the soil, though it is a manufactory, it is perfectly immaterial whether it is for the purpose of a manufac-

tory, or a granary, or a barn or anything else. It is a fixture on the soil, and it becomes part of the soil. But although it is a manufactory, nobody says it belongs to the executor. It would go unquestionably to the heir."

Wood, V.-C., in the case of *Mather v. Fraser*, 2 K. & J. 536; 25 L. J. Ch. 361, said, "With respect to fixtures the old rules of law were very strict: Whatever had been once fixed to the freehold by screws or soldered, passed as between the heir and the executor with that to which it was so attached; the reason being that the owner by having so attached the article to the soil is considered to have expressed his intention that it should no longer continue a moveable chattel. . . . In *Winn v. Ingilby* [5 B. & Ald. 625], the question was whether the sheriff could under a *fi. fa.* seize fixtures where the house in which they were situated was the freehold of the person against whom the execution issued. Now it struck me as a very common practice for the sheriff under a *fi. fa.* to seize locks, bolts, bars, and other ordinary house fixtures, and that was so in *Place v. Fagg* [4 M. & R. 277.] In both these cases it was held that the sheriff could not take fixtures in a house whereof the freehold was in the debtor, the principle being that where the owner of the freehold fixes articles to the freehold they belong to the freehold, the case not being one as between landlord and tenant, but between the heir and executor." From these cases it is evident that if at any time a relaxation of the strict rule "*quicquid solo plantatur, solo cedit*," as between heir and executor, was ever contemplated, at the present time it is applied in full force in favour of the inheritance.

Same rule applies to tenants for life or in tail and remainderman or reversioner, except that life tenant may remove trade fixtures and fixtures for mixed purpose.

The above cases that have arisen between the heir and executor apply as well to the cases of a life tenant or tenant in tail and remainderman or reversioner, with the following important modification, viz., from the few cases that have arisen between tenants for life or their representatives and remaindermen, it appears that the life tenant or his representative is entitled to sever and remove trade fixtures and fixtures for a mixed purpose (*i.e.*, when trade and the profits of land are combined). *Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Warde*, Amb. 113; *Bain v. Brand*, 1 App. Ca. at p. 776. In *Ward v. Countess of Dudley*, 57 L. T. 20, a tenant for life of real estate, who was entitled to hold and enjoy the working stock and plant of certain iron mines and collieries situate on the estate, and carry on such iron mines and collieries, erected

on the estate, machinery, &c., blast furnaces, and a railway of considerable length connecting the mines and collieries. On his death the question arose whether, in an account between his executors and the remainderman, the former should be credited with the value of the machinery, &c., or whether the same passed to the remainderman as things annexed to the soil. It was held, that the machinery annexed to the soil for the purpose of rendering the minerals merchantable, if such machinery was capable of being removed therefrom by disturbing the soil without destroying the land, was machinery which could not be said to be so attached to the land as to become part of it and belong to the owner of the land, but was to be deemed to be trade fixtures which passed to the executor as personalty on the authority of *Wake v. Hall*, 8 App. Ca. 195; 48 L. T. 834.

Whether a tenant for life or his representative is debarred from removing ornamental or domestic fixtures seems to be open to some doubt. *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.

Removal of ornamental or domestic fixtures by life tenant, doubtful.

CHAPTER XXII.

EXECUTION IN RELATION TO MARRIED WOMEN.

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Property at Common Law.

Protection of
property of
wife by
trustees.

APART from the Married Women's Property Acts, the following may be taken as a summary of the law of Husband and Wife in relation to Execution: "By the common law the wife can have no property during the coverture, but all her estate is vested in the husband. But Courts of Equity have for ages past thought the rules of the common law too hard, and have thought it right to protect the property of the wife from the extravagance of the husband, in cases clear of fraud. This is done by the intervention of trustees; and thus far the wife is, to all intents and purposes, a single woman; and wherever that trust can be supported in equity, this Court will consider the trustee entitled at law." *Per* Lord Mansfield, in *Haselinton v. Gill*, 3 T. R. 620. Equity, moreover, protects property to which a married woman is entitled for her separate use, even without the intervention of trustees. As to what words of disposition are sufficient to secure property to a married woman as her separate estate, see 8th ed. Lewin on Trusts, pp. 755 *et seq.* A trust to pay income to a woman for her separate use exists only during coverture, but in the case of a widow who remarries, it comes into force again during the second or any succeeding coverture, unless the trust is expressly limited to one specific marriage. *Tullett v. Armstrong*, 1 Beav. 1; *Moore v. Morris*, 3 Jur. N. S. 552. In the words of Kay, L. J., "A trust for the separate use of a woman is completely inoperative while she is discovert, but it becomes effective the moment she marries, and continues so during any coverture or any number

of successive covertures." *Pelton Brothers v. Harrison*, [1891] 2 Q. B. at p. 426.

A married woman's earnings in any trade or business which her husband may permit her to carry on, although without any express agreement in that behalf, are her separate property. So, also, by the custom of the city of London, the earnings of a married woman, solely trading there on her own account without her husband's intermeddling, are her separate estate. Again, the property of a married woman who has obtained an order of protection under 20 & 21 Vict. c. 85, s. 21, or an order of judicial separation under 21 & 22 Vict. c. 108, s. 8, or a magistrate's separation order under 41 Vict. c. 19, is her separate estate. In this connection, see *Hill v. Cooper*, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423. The Court also protects the earnings of a married woman whose husband has deserted her, or is convicted of felony.

Married woman's earnings in trade her separate property.

Separate property under order of protection or judicial separation;

or where husband has deserted.

Though the property of a married woman, not settled to her separate use, vested in the husband under the common law, yet, if the husband brought a suit in equity to enforce his claims, the practice of the Court was to refuse him assistance except upon the terms that he made a suitable settlement upon his wife and her children; this doctrine is called the wife's equity to a settlement. Equity, moreover, allowed a married woman to deal with her separate estate by assignment or charge, or otherwise as she thought fit, unless the instrument under which she took the property expressly forbade her to assign it. This was and is done by a proviso known as a clause in restraint of anticipation, which is still effective in preventing her dealing with the capital or future income of her separate estate. The effect of a clause in restraint of anticipation is expressly preserved by the Married Women's Property Acts, but the Court can in certain cases, and with her consent, bind her property subject to such a restraint (see the Conveyancing Act, 1881; *In re Little*, 40 Ch. D. 418; *In re Milner's Settlement*, [1891] 3 Ch. 547); and under the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2, she may be ordered to pay costs out of such a fund. See *post*, p. 281. A restraint on anticipation is of no avail unless the property is given to the separate use of a woman; a gift to separate use will not be implied from the mere existence of a restraint on anticipation. *Stogdon v. Lee*, [1891] 1 Q. B. 661.

Wife's equity to a settlement.

Clause in restraint of anticipation.

Costs may be ordered to be paid out of property subject to restraint.

As to the husband's interest in his wife's property, he is Husband

entitled to income of wife's freehold and copyhold property during coverture;

entitled during the coverture to the income of all freehold and copyhold property of which the wife is or may be seized at and subsequent to the marriage. But under the provisions of 3 & 4 Will. 4, c. 74, a married woman can with her husband's concurrence and by duly acknowledged deed dispose of her lands and money subject to be invested in the purchase of lands and any estate therein, and also release and extinguish powers as a *feme sole*. Such Act is not, however, to extend to copyhold lands "of or to which a married woman, or she and her husband in her right, may be seized or entitled for an estate at law in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her in concurrence with her husband by surrender into the hands of the lord of the manor of which the lands may be parcel" (sect. 77); whilst a married woman must be separately examined on the surrender of an equitable estate in copyholds as if such estate were legal (sect. 90). Moreover, a married woman can dispose of her land independently of her husband, and by unacknowledged deed, in exercise of a power of appointment. The husband is also entitled to a life interest in such freehold property of his wife (except as to gavelkind lands) as she was solely seized in actual possession for an estate of inheritance during the marriage in the event of his surviving her and of their having had issue born alive capable of inheriting the property, he being said to be tenant by the curtesy in respect of this interest. "And it is now settled that where a married woman has an equitable estate of inheritance to her separate use and does not dispose of it by deed or will, her husband is entitled to curtesy." *Per* Jessel, M. R., in *Cooper v. Macdonald*, 7 Ch. D. 288. The Married Women's Property Acts do not affect tenancy by the curtesy. See *Hope v. Hope*, [1892] 2 Ch. 336. But it seems a special custom is necessary to entitle a husband to be tenant by the curtesy of his wife's copyhold property.

and of freehold property during life, if he survive, &c.;

but there must be special custom in case of copyhold property. Leasehold property belongs to husband during coverture;

A wife's leasehold property belongs to and can be absolutely disposed of during the coverture by the husband, subject, in the case of reversionary terms, to such falling in during the coverture, and, in the case of her interest being only equitable, to her concurring in and acknowledging the deed of disposition for the purpose of barring her equity to a settlement. He cannot, however, dispose by will of her leasehold property, and it accrues to the wife in the event of the husband predeceasing her without his having so disposed thereof during his lifetime. If, on the

and abso-

other hand, the husband survive the wife, her leasehold property belongs to him absolutely. It is, moreover, liable for his debts and subject to forfeiture to the Crown on his outlawry.

At common law a married woman's personal chattels belong absolutely to the husband, and can be disposed of by him as his absolute property, whilst they are also subject to his debts. To this general rule the wife's paraphernalia forms an exception. By "paraphernalia" is meant such apparel and ornaments as are suitable to her rank and degree. The husband may dispose of his wife's paraphernalia during his life, but not by will; it is also subject to his debts where there is a deficiency of assets. Black. Com.; *Campion v. Cotton*, 17 Ves. 263. Old family jewels are not included in the term. *Jerroise v. Jerroise*, 17 Beav. 570. See also *Laing v. Walker*, 64 L. T. 527. And see as to paraphernalia and wedding presents, *Williams v. Mercier*, 9 Q. B. D. 337; 10 App. Cas. 1; and *In re Jamieson, Ex parte Pannell*, 60 L. T. 159; 37 W. R. 464.

As to the wife's choses in action, the husband is only entitled thereto if he has reduced them into possession during the coverture, so that the wife is entitled to such choses in action in the event of no such reduction into possession and of her surviving the husband. "The rule of law is that a married woman can make no contract, but that choses in action may be given to her either before or after the marriage, and that if there be a chose in action given to the wife even after marriage, then the husband may sue for that either in his own name or that of his wife, but if he does not do anything to reduce the chose in action into possession, if the wife survives, it becomes her property." *Per* Lord Justice Mellish in *Lloyd v. Pugh*, L. R. 8 Ch. 88; 28 L. T. 250. If, on the other hand, the husband survive the wife, he is entitled to her choses in action not so reduced in possession *quâ* administrator to her effects, her administrator being, however, entitled to such choses in action, in the event of the husband's death without his having administered.

As to the wife's reversionary choses in action, a married woman may, with her husband's concurrence and by duly acknowledged deed, dispose of all reversionary interests in personalty to which she or her husband in her right is entitled under any instrument (other than her marriage settlement) made after the 31st December, 1857, and which she is not restrained from alienating. 20 & 21 Vict. c. 57.

lutely, if he survive.

Personal chattels belong absolutely to husband; except paraphernalia.

Choses in action belong to husband if he has reduced them during coverture.

If he survive, choses in action not reduced belong to him.

When wife may dispose of reversionary choses in action.

Husband's
right to
reversionary
property of
wife.

The right of the husband to the reversionary property of his wife depends upon whether it falls into possession during or after coverture. See this subject discussed in Lush on Law of Husband and Wife, p. 50. The husband has, of course, no interest in property held by the wife *in autre droit*.

Widow's
right to dower
when married
before Dower
Act, 1833;

As to a wife's interest in her husband's property, a widow whose marriage took place on or before the 1st of January, 1834, is entitled to dower [*i. e.*, a life interest in a third] out of any estate of inheritance of which the husband was solely seised and of which any issue of the wife might have been heir; and this right having once attached to lands adhered to them notwithstanding alienation by the husband, and was independent of his debts. It extended to incorporeal hereditaments but not to equitable estates. 2 Black. Com.; Co. Litt. 31; 1 Stephen's Com. A widow's dower in gavelkind lands consists of a moiety but continues only during widowhood and chastity. Co. Litt.

when married
after Dower
Act, 1833.

31 a. As to women married since the 1st January, 1834, by the Dower Act, 1833 (3 & 4 Will. 4, c. 105), widows are to be entitled to dower out of equitable estates (sect. 2); seisin is not necessary to give title to dower, when a husband shall have been entitled to a right of entry or action in any land and his widow would be entitled to dower thereout if he had recovered possession thereof, provided such dower be sued for and obtained within the period during which such right of entry or action might be enforced (sect. 3); but no widow shall be entitled to dower out of any land absolutely disposed of by her husband in his lifetime or by his will (sect. 4); and all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements, to which his land shall be subject or liable, shall be effectual as against his widow's right to dower (sect. 5); whilst dower may be barred by a declaration to that effect in a deed (sect. 6), or in the husband's will (sect. 7), and in the absence of a contrary intention in his will, by a husband's devise to his widow of any real estate wherein she would otherwise be entitled to dower (sect. 9). In the absence, however, of a like contrary intention his bequest of personal estate to her shall not bar her dower (sect. 10). Moreover, a widow's right to dower shall be subject to any restrictions contained in her husband's will. (Sect. 8.) But an agreement not to bar dower may be enforced. (Sect. 11.) A wife has also an interest, termed her freebench, in her husband's copyhold lands, where, as is usually the case, a special custom exists in

Right of
freebench
in copyhold
lands.

that behalf. Freebench usually consists of a life interest in a divided third part, or sometimes in the whole of his copyhold lands. Freebench is, moreover, unaffected by the husband's debts, but it does not usually attach until his death and may be therefore barred by his devise of the lands. The Dower Act does not extend to copyhold property or freebench.

For particulars of the wife's interest in her husband's personal property on intestacy, see the Statutes of Distribution, 22 & 23 Car. 2, c. 10; 29 Car. 2, c. 3, s. 24; and 1 Jac. 2, c. 17, s. 7, as qualified by the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29).

Wife's interest in personal property, if husband dies intestate.

As to husband and wife's disposition of their property from one to the other during marriage, and as to property in the mixed possession of both parties, see Lush's Law of Husband and Wife, pp. 207 to 212, and subsequent applicable decisions.

Disposition of property of husband and wife to one another during marriage.

In the case of persons married prior to the Married Women's Property Act, 1870, the husband was liable for his wife's antenuptial debts absolutely, whilst for her debts incurred during coverture he was liable on a presumption of agency at least so far as regards necessaries and household matters where the husband and wife lived together; but this presumption may be rebutted by evidence that the wife was not authorized to pledge her husband's credit. See *Jolly v. Rees*, 15 C. B. N. S. 628; 33 L. J. C. P. 177; *Debenham v. Mellon*, 6 App. Ca. 24; 50 L. J. Q. B. 155; 43 L. T. 673; and the latest case on the subject, *Jenkinson v. Bullock*, 8 T. L. R. 61. In the event of separation, a case of necessity may arise which would make the husband *prima facie* liable, as where he deserts his wife, or has by his conduct compelled her to live apart from him without properly providing for her. See the judgment of Selborne, L. C., in *Debenham v. Mellon*, 6 App. Ca. 31. Where the wife has committed adultery, without the connivance of her husband and he has not condoned it, he is not liable for her support. *Culley v. Charman*, 7 Q. B. D. 89; *Wilson v. Glossop*, 20 Q. B. D. 354. But "ever since the doctrine of separate use has been established, a married woman has been considered in respect of her separate estate as a *feme sole*, and capable of making herself liable upon all contracts entered into by her with reference to it." *Per* Cotton, L. J., in *Butler v. Butler*, 16 Q. B. D. 379. If the creditor, in fact, gives credit to the wife, the husband cannot be made liable and the contract will bind the separate estate under

Husband liable for wife's antenuptial debts when married before 1870; and during coverture for necessaries;

and during separation in certain cases.

But since separate use established, wife liable in respect of it.

the provisions of the Married Women's Property Act, 1893, s. 1, extending the corresponding section of the Act of 1882. See *post*, p. 280.

Husband
cannot re-
cover ante-
nuptial loans;
but may re-
cover post-
nuptial.

As to advances made by a husband to his wife, he cannot maintain an action against her to recover out of her separate estate ante-nuptial loans and advances. But he can recover from her money which after their marriage he has advanced to her on a contract by her, either express or implied, to repay it out of her separate estate, and such right has not been affected by the Married Women's Property Act, 1882. *Butler v. Butler*, 14 Q. B. D. 831; 16 Q. B. D. 374.

Property under Married Women's Property Acts.

Modification
of common
law by
Married
Women's
Property
Acts.

The common law is now modified by the Married Women's Property Acts of 1870, 1874, 1882, and 1893 (33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50; 45 & 46 Vict. c. 75; and 56 & 57 Vict. c. 63). The two earlier Acts have been repealed by the Act of 1882, but owing to the saving clause they are still of some practical importance. By the operation of these Acts there are now four classes of married women, viz. :—

- (1) Those women married prior to the passing of the Married Women's Property Act, 1870 (9th August, 1870).
- (2) Those married after the passing of the Married Women's Property Act, 1870, and before the passing of the Married Women's Property Act, 1874 (30th July, 1874).
- (3) Those married after the passing of the Married Women's Property Act, 1874, and before the passing of the Married Women's Property Act, 1882 (1st January, 1883).
- (4) Those married since the passing of the Married Women's Property Act, 1882.

The subject will be dealt with generally under the heading of the first class, showing in what respects the common law has been affected by the Married Women's Property Acts and subsequently the distinctions between the different classes will be pointed out.

(1) *Women married prior to the passing of the Married Women's Property Act, 1870 (9th August, 1870).*

By the Married Women's Property Acts the common law has been amended in the following respects:—

(a) Wages and earnings of a married woman acquired by her after the 9th August, 1870, in any employment, occupation, or trade, which she carried on separately from her husband, and all investments of such wages, earnings, or money so acquired are her separate property. Married Women's Property Act, 1870, s. 1, re-enacted by the Married Women's Property Act, 1882, s. 5. The law on this point, apart from the Acts, will be found in the judgment of Malins, V.-C., in *Ashworth v. Outram*, 5 Ch. D. 923; 46 L. J. Ch. 687. As to what is sufficient to constitute a separate business, see *Ashworth v. Outram*, *supra*; *Lovell v. Newton*, 4 C. P. D. 7; 39 L. T. 609; *In re Dearmer*, *James v. Dearmer*, 53 L. T. 905; W. N. (1885) 212; *Laporte v. Costick*, 31 L. T. 434; 23 W. R. 131. It is, however, a question to be determined on the evidence.

(a) Earnings and investments thereof to be separate property.

(b) Deposits in a savings bank, annuities granted by the commissioners for the reduction of the National Debt (Married Women's Property Act, 1870, s. 2), and, under certain conditions, money in the funds, not being less than 20l. (sect. 3), fully paid-up shares, debentures, debenture stock, or stock in or of an incorporated or joint stock company (sect. 4), shares, benefits, debentures, &c. in a friendly, benefit building, or loan society (sect. 5) are her separate property. These provisions have been amended and extended by sect. 6 of the Married Women's Property Act, 1882, which enacts that all deposits in savings banks, or any other bank, all annuities granted by the above-named commissioners or by any other persons, all sums forming part of the public stocks or funds or of any other stock or funds transferable in the books of the Bank of England, or of any other bank, which, on the 1st of January, 1883, were standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society which on the last named day stood in her name, are to be deemed, until the contrary be shown, to be her separate property; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of

(b) Deposits in savings banks, and property in funds, &c., deemed separate property.

Extension by 1882 Act.

any other stocks or funds transferable in the books of the Bank of England, or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use. Sect. 7 extends this to such stock, &c. as is after the commencement of the Act transferred, &c. into her name, and sect. 8 to stock standing in her name jointly with that of some other person, not being her husband.

(c) Real and personal property, if title accrued after 1882 Act, to be separate property; but not separate property if title acquired before Act.

(c) All real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder should accrue after the 1st of January, 1883, is her separate property. Married Women's Property Act, 1882, s. 5.

In *Reid v. Reid*, 31 Ch. D. 402; 54 L. T. 100; 55 L. J. Ch. 294, it was held that if a woman, married before the commencement of the Act, had, before that date, acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate estate though it falls into possession after the Act. See also *In re Adame's Trusts*, 54 L. J. Ch. 878; 53 L. T. 198. But in *In re Parsons, Stockley v. Parsons*, 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929, it was held that a mere *spes successionis* is not a title in English law, and that a woman who had a prospect of succeeding as one of a class of possible next of kin, had not a contingent title within the above section.

(d) Married woman to be capable of holding and disposing of property as a *feme sole*.

(d) By sect. 1, sub-sect. 1 of the Married Women's Property Act, 1882, a married woman is, in accordance with the provisions of that Act, capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. The generality of this section is cut down by the words "in accordance with the provisions of this Act" and it has been held in *In re Cuno, Mansfield v. Mansfield*, 43 Ch. D. 12; 62 L. T. 15, that this section must, in the case of a woman married before the Act, be read in connection with sect. 5 (*ante*), and that it does not give such a woman power to dispose of property not falling within the scope of this latter section. In *In re Harris' Settled Estates*, 28 Ch. D. 171, it was held that in the case of such women the section applied to property acquired after the commencement of the Act only, and therefore in proceedings under the Settled Estates Act, 1877, relating to property acquired previously to that date she

Sect. 1, sub-s. 1, held not to apply to property acquired before 1882 Act.

must still be separately examined. In the case of women married since the Act, and in cases where the title to the property accrued after the Act though the woman married before the Act, the acknowledgment by the wife or concurrence of the husband required by sect. 40 of the Fines and Recoveries Act does not appear to be necessary. *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524; 60 L. J. Ch. 258; 64 L. T. 246.

Restraints on anticipation are still preserved, and settlements are protected, as to which, see *post*, p. 280.

The power given to a married woman to dispose by will of property extends only to property of which she is seised or possessed while she is under coverture; consequently her will, made during coverture, is not, unless she re-execute it after she is discovert, effectual to dispose of property which she acquires after the coverture has ceased. *In re Price, Stafford v. Stafford*, 28 Ch. D. 709; 54 L. J. Ch. 509; 52 L. T. 430; *In re Young, Trye v. Sullivan*, 28 Ch. D. 705; 52 L. T. 754. A will made before the Act by a woman having at the time capacity to make a will is effectual to pass separate property subsequently acquired under the provisions of the Act without re-execution. *In re Bowen, James v. James*, [1892] 2 Ch. 291; 61 L. J. Ch. 432. It appears that this general enactment does not repeal a section in a prior Act expressly disabling a married woman from doing certain acts, as *e.g.*, from giving by will land and chattels towards the erection of churches. *In re Smith's Estate, Clements v. Ward*, 35 Ch. D. 589; 56 L. J. Ch. 726; 56 L. T. 850. As to the proper form of probate, see *In bonis Price*, 12 P. D. 137; 56 L. J. P. 72; 57 L. T. 497.

(e) By sect. 1, sub-sect. 2, of the Married Women's Property Act, 1882, "A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise." This sub-section does not render a married woman personally liable. *Draycott v. Harrison*, 17 Q. B. D. 147; *Scott*

Restraints on anticipation and settlements preserved.

Power to dispose by will only extends to property in possession during coverture.

(e) Married woman to be capable of contracting as a *feme sole*;

but cannot contract except in respect of separate property.

v. Morley, 20 Q. B. D. 120; 57 L. J. Q. B. 43. She cannot contract, except in respect of her separate property, and it was held that under the Married Women's Property Act, 1882, a plaintiff's action would fail if he could not prove that she had separate property at the time when the contract was entered into. *Palliser v. Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546; *In re Shakespeare, Deakin v. Lakin*, 30 Ch. D. 169; 55 L. J. Ch. 44; 53 L. T. 145; *Leak v. Driffeld*, 24 Q. B. D. 98; 59 L. J. Q. B. 89; *Stogdon v. Lee*, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669; *Braunstein v. Lewis*, 65 L. T. 449; *Pelton Brothers v. Harrison*, [1891] 2 Q. B. 422. But now sect. 1 of the Act of 1893 (repealing sect. 1, sub-sects. 2 and 4 of the Act of 1882) provides that every contract hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at th t time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to; Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

Judgment against married woman.

For the form of judgment against a married woman under the Act of 1882, see *Scott v. Morley*, 20 Q. B. D. 120, at p. 132.

No restriction on anticipation in settlement made by married woman valid against antenuptial debts.

Sect. 19 of the Married Women's Property Act, 1882, after providing for the protection of existing and future settlements and restrictions on anticipation, enacts that no restriction on anticipation, contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against the creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors. This section, so far as it affects the validity of a settlement or an agreement for a settlement as against the creditors of a married woman, is not retrospective. Therefore

Settlement, &c., by married woman not to have greater validity against creditors than by a man.

execution cannot issue against property settled before the commencement of the Act, to the separate use of a married woman without power of anticipation. *Smith v. Whitlock*, 55 L. J. Q. B. 286; 34 W. R. 414. Where property is settled to the separate use of the wife, but without any restraint on anticipation, this section does not protect it from the trustee in her bankruptcy. *In re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264; 57 L. J. Q. B. 553. See also on this section *Beckett v. Tasker*, 19 Q. B. D. 7, and *Hemingway v. Braithwaite*, 61 L. T. 224. Where a married woman who had separate property subject to a restraint on anticipation incurred a liability and was sued after the death of her husband, it was held that the removal of the restraint by the death of the husband did not make the property liable. *Pelton Bros. v. Harrison*, [1891] 2 Q. B. 422; 60 L. J. Q. B. 742; 65 L. T. 514; 39 W. R. 689.

The protection given by restraint on anticipation has been removed in one instance by section 2 of the Act of 1893, which provides that in any action or proceeding instituted by a married woman the Court may order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation and may enforce such payment by the appointment of a receiver, and the sale of the property or otherwise.

Section 13 of the Married Women's Property Act, 1882, provides that the wife shall continue liable in respect and to the extent of her separate estate for her ante-nuptial debts. In the case of marriages before the 9th August, 1870, the husband is also liable for these debts. Section 14 of the Married Women's Property Act, 1882, contains a provision that nothing in that Act shall operate to increase or diminish the liability of any husband married before the Act in respect of such debts and liabilities.

(f) The Married Women's Property Act, 1882, also contains provisions relating to the remedies of married women for the protection of their property (sect. 12), to the bankruptcy of married women who carry on separate trades (sect. 1 (5)), to loans by the wife to the husband (sect. 3), to the effect of execution of general powers (sect. 4), to investments in the joint names of married women and others (sect. 9), to fraudulent investments with the moneys of the husband (sect. 10), to policies of insurance (sect. 11), to criminal proceedings for acts done by the wife with respect to any property of the husband (sect. 16), to the summary determination of questions between the husband and wife as to property (sect. 17), to powers to act either as executrix

Costs may be ordered to be paid out of property, subject to restraint on anticipation.

Married woman liable for ante-nuptial debts. Husband also liable when married before 1870 Act.

(f) Other provisions of 1882 Act, relating to remedies, bankruptcy, &c. of married women.

or trustee (sect. 18), to the maintenance of pauper husband and children (sects. 20 and 21), and to the representation of the wife's estate after her death (sect. 23). These matters are, however, beyond the scope of this work, and the reader is referred to the Acts of 1870 and 1882, Lush on Husband and Wife, and Addison on the Law of Contracts, 9th ed.

(2) *Women married on and after the 9th of August, 1870, and before the 30th of July, 1874.*

Additional
separate
property of
woman
married after
1870 Act.

A woman married between these dates has in addition to the property enumerated in the last class the following properties as separate estate, viz.:—(a) Any personal property coming to her as next-of-kin of an intestate. Married Women's Property Act, 1870, s. 7. (b) Any sum of money, not exceeding 200*l.*, coming to her under a deed or will. *Ib.* (c) Where any freehold, copyhold, or customaryhold property descends upon any woman as heiress, the rents and profits belong to her for her separate use. Married Women's Property Act, 1870, s. 8. In each case such property shall become her separate property without prejudice to the trusts of any settlement. She cannot pass the fee-simple in such real estate by an unacknowledged deed. *Johnson v. Johnson*, 35 Ch. D. 345; 56 L. T. 163; 56 L. J. Ch. 326. In those cases where such property as above mentioned comes to or descends upon the wife on or after the 1st January, 1883, the Act of 1882, as we have already seen, applies.

Husbands
married
between 1870
and 1874 Acts
not liable for
wife's ante-
nuptial debts.

Husbands who have married between the 9th August, 1870, (inclusive) and the 30th July, 1874, are not liable for their wives' ante-nuptial debts. Married Women's Property Act, 1870, s. 12.

(3) *Women married on and after the 30th of July, 1874, and before the 1st of January, 1883.*

Husband
liable for
wife's ante-
nuptial debts
to amount of
assets received
from her.

These women are in every respect, except one, subject to the same laws as govern the second class. The one exception is that the husband is liable for his wife's ante-nuptial debts to the amount of any assets he may have received from her. The assets in respect of and to the extent of which the husband is liable are given in detail in sect. 5 of the Act of 1874, but are not of sufficient practical importance to be set out here.

(4) *Women married on or after the 1st of January, 1883.*

Sect. 2 of the Married Women's Property Act, 1882, enables every woman who marries on or after the above-mentioned date to have and to hold as her separate property and to dispose of all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill. This must be read in conjunction with sect. 19, which protects settlements and restraints on anticipation. But apart from settlements and agreements for settlements, the husband, who has married since the commencement of the Act, takes no interest in his wife's property during her life; but there is nothing which deprives him of an estate by the curtesy in his wife's undisposed-of real estate. *Hope v. Hope*, [1892] 2 Ch. 336; 61 L. J. Ch. 441; 66 L. T. 522; 40 W. R. 522.

Property of woman married after 1882 Act to be held by her as a *feme sole*.

Protection of settlements and restraints on anticipation.

Husband takes no interest during wife's life; but not deprived of curtesy.

By sect. 14 of the Married Women's Property Act, 1882, a husband is liable for his wife's ante-nuptial debts and liabilities to the extent of all property which he acquires or becomes entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts or wrongs for or in respect of which his wife was liable before her marriage; but he shall not be liable for the same further or otherwise. Power is given to any Court in which a husband may be sued to direct an inquiry to ascertain the nature and amount of such property. Sect. 15 contains provisions for suing a husband and wife jointly in respect of such debts and liabilities. A judgment recovered against the wife is no bar to an action against the husband. *Berk v. Pierce*, 23 Q. B. D. 316; 58 L. J. Q. B. 516; 61 L. T. 448. The Statute of Limitations runs in the husband's favour from the date of the debt, and not from the date of the marriage. *Ib.*

Husband liable for wife's ante-nuptial debts to amount of property received from her.

Settlements.

It not being within the scope of this work to deal with marriage settlements, the reader is referred for information thereon to the standard works on the subject. As to avoidance of settlements in bankruptcy, see under title "Bankruptcy—Voluntary Dispositions of Property," *post*, p. 371.

CHAPTER XXIII.

LANDLORD'S CLAIM FOR RENT.

THE landlord has the right to distrain upon his tenant's goods for rent due, that is, he may, without the assistance of any process of law, seize and sell the tenant's goods and so pay himself for rent due. This right is limited and regulated by the Agricultural Holdings Act, 1883, the Law of Distress Act Amendment Act, 1888, and numerous other Acts and decisions which will be found discussed at length in Woodfall's Landlord and Tenant. It is, moreover, subject to one qualification, of great practical importance to sheriffs and their officers, which is, that a landlord cannot distrain upon goods in the custody of the law, and therefore seizure by the sheriff under a writ of execution suspends this security for the payment of rent, so far as the goods so seized are concerned, for so long a time as the goods remain in the actual and complete possession of the sheriff. *Blades v. Arundale*, 1 M. & S. 711.

Right of
landlord to
distrain for
rent due,

unless goods
are in custody
of the law.

But when this possession has ceased, the right to distrain again arises, as where, after the making of an interpleader order, the sheriff, with the consent of the execution creditor and the claimant, temporarily withdrew from possession, it was held that the landlord was entitled to distrain on the goods, even though he knew of the interpleader proceedings, for the goods were no longer in the custody of the law. *Cropper v. Warner*, 1 C. & E. 152; and see *Cooper v. Asprey*, 3 B. & S. 932; 32 L. J. Q. B. 209. So also goods are distrainable which are left on the premises after a fraudulent bill of sale made under an execution. *Smith v. Russell*, 3 Taunt. 400; see *Reed v. Thoyts*, 6 M. & W. 410; 8 D. P. C. 410. So also if the sheriff sell and the purchaser leaves the goods on the premises for an unreasonable time. *Ex parte Pollen, Re Davis*, 55 L. J. Q. B. 217; 54 L. T. 304; 34 W. R. 442; following the earlier cases, *Blades v. Arundale*, 1 M. & S. 711; *Peacock v. Purvis*, 2 Brod. & B. 362; *White v. Binstead*, 13 C. B. 304; 22 L. J. C. P. 115.

When pos-
session has
ceased, right
to distrain
again arises.

Nor does this exemption apply to fraudulent or irregular execution. *Blades v. Arundale*, *supra*; *Smith v. Russell*, *supra*; *St. John's College v. Murcott*, 7 T. R. 259.

In what cases
no goods, &c.
to be taken in
execution,

Landlords being thus liable to be deprived of their remedy by the action of other creditors, the statute 8 Anne, c. 14 (a) was passed for their protection, sect. 1 of which enacts "No goods or chattels whatsoever, being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue

unless execu-
tion creditor
pays rent due
not exceeding
one year's
arrears.

of any execution, on any pretence whatever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this Act, and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money." Under this statute, the sheriff is not bound to inquire whether rent is or is not owing to the landlord, but should the latter give him notice that it is due he will be liable in an action for damages should he permit the goods seized to be removed from the premises without first securing the payment of the rent due to an extent not exceeding one year's arrears. *Andrews v. Dixon*, 3 B. & A. 645. "Construing the Act as it has been hitherto construed, it means that the sheriff is not to remove the goods, unless the rent has been first paid by somebody; if he does, he is liable to an action by the landlord." *Per Parke, B.*, in *Riseley v. Ryle*, 11 M. & W. 16, 20, cited by Lord Denman, C. J., in *Cocker v. Musgrove*, 15 L. J. Q. B. 368. As to the sufficiency of the notice see *Colyer v. Speer*, 2 Brod. & B. 67. *Semble*, the mere knowledge of the sheriff that rent is due is sufficient; at all events, the sheriff would not be wise in neglecting to make inquiry if he had such knowledge. But see *Thomas v. Mirehouse*, 19 Q. B. D. 563,

Sheriff, &c.
empowered to
pay rent so
paid to execu-
tion creditor.

Sheriff liable
if goods are
removed
before rent
due secured.

(a) 8 Anne, c. 18, Statutes of the Realm.

where the Court of Appeal appears to have thought notice necessary. Upon receiving such notice the sheriff should inquire as to the truth, and, if possible, inspect the lease. *Augustin v. Challis*, 1 Ex. 279. He should also give the execution creditor notice that the rent is in arrear and that he must pay the amount to the landlord. A form for this notice is given in the 15th edit. Woodfall, App. D., No. 14. That form, which is reprinted by permission, is as follows:—

Sheriff should give notice to execution creditor that rent is in arrear.
Form of notice.

Form of Notice by the Sheriff to the Execution Creditor that rent is owing.

In the High Court of Justice,
Division.

Between A. B., - - - - - Plaintiff

and

C. D., - - - - - Defendant.

TAKE NOTICE, that the sum of £ is due and owing from the above-named defendant to his landlord I. K., of Esq. for [one year's or one half-year's rent or one quarter's] rent, due on the day of last, for and in respect of the [house or farm, land and] premises situate at , in the county of , now in the occupation of the said defendant, and upon which certain goods and chattels have been seized by the sheriff of under the writ of *fiert facias* issued in this action [and the said sheriff has had notice of such arrears of rent (b)]: Now I do hereby, as the agent of the said sheriff and on his behalf, give you notice that unless the above-named plaintiff do forthwith pay the arrears of rent due to the said landlord, either to him or to his bailiff, pursuant to the statute in such case made and provided, the said sheriff will withdraw from possession of the said goods and chattels under the said writ.

Dated this day of , 18 .

Yours, &c.,

L. M. of

Agent of the sheriff of .

To the above-named plaintiff, and to }

Mr. , his solicitor or agent. }

If the execution creditor does not comply with this notice by paying the rent due (not exceeding one year's arrears), the safer course is for the sheriff to withdraw at once and make a return of *nulla bona* unless he can find other goods of the debtor within

If execution creditor does not comply, sheriff should withdraw;

(b) Omit this if inaccurate. Express notice to the sheriff appears to be unnecessary; it is sufficient if he knows of the arrears of rent. He should inspect the lease, and obtain legal proof of the arrears due.

but he may execute and, after paying rent, pay surplus to execution creditor.

Statute applies only to rent accrued due,

and only to existing tenancies.

Statute does not apply unless goods actually removed,

his bailiwick but not on the landlord's premises. Lord Denman, C. J., delivering the judgment of the Court in *Cocker v. Musgrove*, 9 Q. B. 235; 15 L. J. Q. B. 368, said: "The sheriff is not called upon by law to advance money to pay the rent; it is plain that such advance must be made by the execution creditor; and if he neglects to make it, after notice of the rent being due, at all events (and it is not necessary now to say whether notice be requisite) the sheriff cannot be called upon to sell the goods, let their value be what it will. Until the rent be paid, there are no goods out of which the sheriff is bound to levy, that is, which he is bound to sell." The sheriff may, however, if he prefers to do so, proceed with the execution, sell the goods, and out of the proceeds pay the landlord, paying the surplus after payment of rent in satisfaction of the execution; by so doing he secures his poundage, fees, &c., but incurs considerable risk, as to which, see Woodfall, 15th ed., 528.

The statute applies to rent accrued due, and not therefore to rent accruing thereafter and during the sheriff's possession. *Hoskins v. Knight*, 1 M. & S. 245. Rent stipulated by a lease to be paid in advance has, however, accrued due. *Harrison v. Barry*, 7 Price, 690. And under 14 & 15 Vict. c. 25, s. 2, growing crops seized and sold by the sheriff are liable to the accruing rent notwithstanding such seizure and sale for so long as they remain on the premises. The sheriff is not bound to allow the landlord a year's rent where, under the circumstances, it must be taken to have ceased at the time of the execution. *Hodgson v. Gascoigne*, 5 B. & A. 88. The statute does not apply to other than existing tenancies at a rent certain (*Riseley v. Ryle*, 10 M. & W. 101), and the sheriff is not liable for removing goods taken in execution without first paying to the landlord a year's rent, where the tenancy has determined before the seizure, though within the six months during which the right of distress is preserved by sects. 6 and 7 of the Act. *Cox v. Leigh*, L. R. 9 Q. B. 333; 43 L. J. Q. B. 123. Moreover, where there are two executions the landlord is not entitled to have a year's rent on each. *Dod v. Saxby*, 2 Stra. 1024.

The statute does not apply unless the goods be actually removed from the premises. *White v. Binstead*, 22 L. J. C. P. 115. The mere execution of a bill of sale by the sheriff to a purchaser does not amount to a removal (*Smallman v. Pollard*, 1 D. & L. 961), but where he receives the proceeds of such a bill of sale he will be ordered to pay the rent out of them.

West v. Hedges, Barnes, 211; *Hinchett v. Kimpson*, 2 Wils. 140. It has been already stated that a sale by the sheriff, if the goods are left on the premises, does not deprive the landlord of his remedy by distress. The statute does not apply to an execution by the landlord. *Taylor v. Langton*, 6 Bing. 536. In *Thurgood v. Richardson*, 7 Bing. 428; 4 C. & P. 481, it was held to be applicable to a case of sub-tenancy, but see also *Bennet's case*, 2 Stra. 787, and words of the statute "the landlord of the said premises."

nor to an execution by landlord; but does in case of sub-tenancy.

The words "all goods or chattels whatsoever lying or being in or upon the premises" include the goods of third parties (*Forster v. Cookson*, 1 Q. B. 419; see, however, the *Lodgers' Protection Act*, 34 & 35 Vict. c. 79), and also, *semble*, goods which are not liable to distress. See *per Parke, B.*, in *Riseley v. Ryle*, 11 M. & W. 16.

Goods of third parties on premises.

The removal of the goods being the act of the sheriff, he and not the execution creditor is liable in an action by the landlord. *Riseley v. Ryle*, 11 M. & W. 16; *Palgrave v. Windham*, 1 Stra. 212. If, there being no distress by the landlord, the goods are sold by the sheriff under an execution after bankruptcy, he will not, if he has notice of the act of bankruptcy, be justified in paying the landlord out of the proceeds (see *Robson on Bankruptcy*, 6th ed. 283), though, *semble*, he may still be liable to the landlord. *Duck v. Braddyll*, M'Clel. 217; 13 Price, 455; *Lee v. Lopes*, 15 East, 230. This is one of the causes which render it unsafe for the sheriff to proceed after notice that rent is in arrear.

Sheriff liable for removal, and not execution creditor.

Though the sheriff is entitled to poundage, he cannot deduct it from the rent paid to the landlord. *Davies v. Edmonds*, 12 M. & W. 31; *Gore v. Goffton*, 1 Stra. 643. Nor can anything be deducted in respect of remissions usually granted to the tenant. *Tindal, C. J.*, says: "The landlord is not bound to make an abatement to the tenant's creditors because he has chosen to make an abatement to the tenant." *Williams v. Lewsey*, 8 Bing. 28.

Sheriff cannot deduct poundage from rent; nor remissions granted to tenant.

After notice that rent is due to the landlord, if the sheriff does not pay over the rent due under this statute (not exceeding a year's arrears), but proceeds to levy execution and remove the goods of the tenant, the landlord's remedy is by summary application to the Court or a judge at chambers that he may be paid what is due to him out of the money levied (*Hinchett v. Kimpson*, 2 Wils. 140), or he may bring a special action on the

Remedy of landlord where sheriff removes goods without paying rent.

case against the sheriff (*Riseley v. Ryle*, 11 M. & W. 16); but the landlord cannot maintain an action for money had and received. *Green v. Austin*, 3 Camp. 260. In an action against the sheriff for removing goods taken in execution without paying the landlord a year's rent, the measure of damages is *prima facie* the amount of rent due, but the sheriff may reduce them to the real value of the goods, but not to the sum which they fetch at a forced sale. *Thomas v. Mirchouse*, 19 Q. B. D. 563; 56 L. J. Q. B. 653; 36 W. R. 104.

Saving for
Crown debts.

Section 8 of 8 Anne, c. 14, contains a saving for Crown debts, which provides that nothing in the Act is "to let, hinder, or prejudice her Majesty, her heirs or successors, in the levying, recovering or seizing any debts, fines, penalties or forfeitures due, payable, or answerable to her"; but that it shall and may be lawful for her to levy, recover and seize the same in the same manner as if the Act had never been made; anything in the Act contained to the contrary notwithstanding.

Landlord's
claim in cases
of tenancies
for less than
a year.

The statute 8 Anne, c. 14, does not apply to tenancies for less than a year; but with regard to these, 7 & 8 Vict. c. 96, s. 67, enacts that "no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any Court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

County Court
executions.

With regard to County Court executions, sect. 160 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), provides that the statute of Anne shall have no application thereto, but in lieu of that statute provisions enabling the landlord, by notice to the bailiff within five days of the taking, to claim certain arrears of rent are enacted.

Attornment
clause.

It may be added with regard to *attornment* that the only advantage to be now gained by an attornment clause in a mortgage is the facility it affords for obtaining possession of the mortgaged property. *Mumford v. Collier*, 25 Q. B. D. 279; 59 L. J. Q. B. 552.

CHAPTER XXIV.

BILLS OF SALE.

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Synopsis of Statutes.

A BILL of sale is, perhaps, the most usual form of adverse claim in execution. It is accordingly essential to be conversant with the subject, and, in particular, with the recent Bills of Sale Acts, the majority of existing bills of sale being governed by these Acts. This object will, it is conceived, be best effected by the following mode of treating the subject. It should be noticed that the Bills of Sale Acts of 1854 and 1866 have been repealed by section 23 of the Bills of Sale Act, 1878, except so far as it has been provided by that section that they shall continue in force with regard to bills of sale executed before the commencement of that Act.

BILLS OF SALE ACT, 1854 (17 & 18 VICT. c. 36) (*a*).

(Date of Commencement, 10th July, 1854.)

Bill of sale
void, unless
the same or a
copy be filed
within
twenty-one
days.

Sect. 1. "Every bill of sale of personal chattels made after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docket and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall as against [amongst others] all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill

(*a*) This Act is repealed by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) s. 23, *post*, p. 301.

of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be."

Sect. 2. "If such bill of sale shall be made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance or condition or declaration of trust shall, for the purposes of this Act, be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such bill of sale shall be null and void to all intents and purposes, as against the same persons and as regards the same property and effects, as if such bill of sale or a copy thereof had not been filed according to the provisions of this Act."

Defeasance or condition of every bill of sale to be written on same paper or parchment.

By sect. 3, the officer of the Court is to keep a book containing particulars of each bill of sale.

Officer of Court to keep record.

By sect. 4, the officer is entitled to a fee of 1s. for filing a bill of sale or a copy thereof, and shall render an account of the same to the commissioners of the treasury.

Fee of officer for filing.

By sect. 5, office copies or extracts are to be given to any person on payment at like rate as for copies of judgments.

Office copies.

Sect. 6 provides for entry of satisfaction.

Entry of satisfaction.

Sect. 7. "In construing this Act the following words and expressions shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such constructions; (that is to say),—

Interpretation of terms.

"The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same; marriage settlements; transfers or assignments of any ship or vessel or any share thereof; transfers of goods in the ordinary course of business of any trade or calling; bills of sale of goods in foreign parts or at sea; bills of lading; India warrants; warehouse keepers' certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing

or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented :

“The expression ‘personal chattels’ shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery, and shall not include chattel interests in real estate, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of any incorporated or joint stock company, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale :

“Personal chattels shall be deemed to be in the ‘apparent possession’ of the person making or giving the bill of sale so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.”

Extent of Act. Sect. 8. “This Act shall not extend to Scotland.”

THE BILLS OF SALE ACT, 1866 (29 & 30 VICT. c. 96) (b).

An Act to amend the Bills of Sale Act, 1854.

(Date of Commencement, 10th August, 1866.)

Construction of Act.

Sect. 1. “The principal Act and this Act shall, as far as is consistent with the tenor of such Acts, be construed together.”

Short titles.

Sect. 2. “The principal Act may be cited as ‘The Bills of Sale Act, 1854,’ and this Act may be cited as ‘The Bills of Sale Act, 1866.’”

Definition of registration of a bill of sale.

Sect. 3. “The filing of a bill of sale, or a copy thereof, with the affidavit required by the principal Act, is hereinafter referred to as the registration of a bill of sale.”

Renewal of registration of bills of sale.

Sect. 4. “The registration of a bill of sale under the principal Act shall, during the subsistence of such security, be renewed in

(b) This Act is repealed by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 23, *post*, p. 301.

manner hereinafter mentioned once in every period of five years, commencing from the day of the registration, and, if not so renewed, such registration shall cease to be of any effect at the expiration of any period of five years during which a renewal has not been made as hereby required, subject to this provision, that where a period of five years from the original registration of any bill of sale under the principal Act has expired before the first day of January one thousand eight hundred and sixty-seven, such bill of sale shall be as valid to all intents and purposes as it would have been if this Act had not been passed, if such registration be renewed in manner aforesaid before the first day of January one thousand eight hundred and sixty-seven."

Sect. 5 provides for the mode of renewing bills of sale.

Renewal of
bills of sale.
Stamp on
affidavit.

By sect. 6 the affidavit of renewal is to bear a five shilling stamp.

By sect. 7 the Masters of the Queen's Bench are to keep a book containing particulars of each bill of sale and the affidavit of renewal, and such book and every filed bill of sale or copy and affidavit of renewal may be searched on payment of one shilling.

Record of
bills of sale.
Search.

By sect. 8 office copies of affidavits of renewal are to be supplied on payment for the same.

Office copies
of affidavits.

Sect. 9 provides for the swearing of affidavits before one of the Masters of the Queen's Bench.

Swearing
affidavits.

Sect. 10 provides for the application of enactments relating to common law stamps to this Act.

Stamps.

Sect. 11 provides that this Act shall not extend to Scotland or Ireland.

Extent of Act.

In Schedules (A) and (B) to the Act a form of affidavit of renewal and a form of the book referred to in sect. 7 are set out.

Forms of
affidavits and
book of par-
ticulars.

THE BILLS OF SALE ACT, 1878 (41 & 42 VICT. C. 31).

Sect. 1. "This Act may be cited for all purposes as 'The Bills of Sale Act, 1878.'"

Short title.

Sect. 2. "This Act shall come into operation on the 1st day of January, 1879, which day is in this Act referred to as the commencement of this Act."

Commence-
ment.

Sect. 3. "This Act shall apply to every bill of sale executed on or after the 1st day of January, 1879 (whether the same be absolute, or subject or not subject to any trust), whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of

Application
of Act.

any personal chattels comprised in or made subject to such bill of sale."

Interpretation
of terms.

Sect. 4. "In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction ; (that is to say,)

"The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-money of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents ; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented :

"The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by

virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale :

“Personal chattels shall be deemed to be in the ‘apparent possession’ of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person :

“‘Prescribed’ means prescribed by rules made under the provisions of this Act.”

Sect. 5. “From and after the commencement of this Act trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act.

Application of
Act to trade
machinery.

“For the purposes of this Act—

“‘Trade machinery’ means the machinery used in or attached to any factory or workshop ;

“1st. Exclusive of the fixed motive-powers, such as the water-wheels and steam engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive-powers ; and

“2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose ; and

“3rd. Exclusive of the pipes for steam, gas, and water in the factory or workshop.

“The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act.

“‘Factory or workshop’ means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them ; that is to say,

“(a) In or incidental to the making any article or part of an article ; or

- “(b) In or incidental to the altering, repairing, ornamenting, finishing, of any article; or
 “(c) In or incidental to the adapting for sale any article.”

Certain instruments giving powers of distress to be subject to this Act.

Sect. 6. “Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

“Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.”

Fixtures or growing crops not to be deemed separately assigned when the land passes by same instrument.

Sect. 7. “No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.

“The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this Act, and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any Court, which shall take place or be issued after the commencement of this Act.”

Avoidance of unregistered bills of sale in certain cases.

Sect. 8. “Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in

such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriff's officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be) " (c). "

Sect. 9. " Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or parts thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act." Avoidance of certain duplicate bills of sale.

Sect. 10. " A bill of sale shall be attested and registered under this Act in the following manner :— " Mode of registering bills of sale.

" (1.) The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor (d) :

(c) This section is repealed by the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 15. *post*, p. 305.

(d) Sub-sect. 1 of sect. 10 is repealed by the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), sect. 10, *post*, p. 304.

“(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed :

“(3.) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.

Priority according to order of registration.

“In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

Transfer need not be registered.
Renewal of registration.

“A transfer or assignment of a registered bill of sale need not be registered.”

Sect. 11. “The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

“The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and

occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

"Every such affidavit may be in the form set forth in the Schedule (A) to this Act annexed.

"A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale."

Sect. 12 provides for the form of register.

Sect. 13 relates to the registrar.

Sect. 14 provides for the rectification of the register.

Sect. 15. "Subject to and in accordance with any rules to be made under and for the purposes of this Act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged" (*e*).

Sect. 16 provides for the taking of copies, &c. (*f*).

Sect. 17 relates to affidavits.

Sects. 18 and 19 relate to fees.

Sect. 20. "Chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869."

Sect. 21 relates to rules (*g*).

Sect. 22. "When the time for registering a bill of sale expires on a Sunday, or other day on which the registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open."

Sect. 23. "From and after the commencement of this Act, the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed: Provided that (except as is herein expressly mentioned with respect to construction and with respect to renewal of registration) nothing in this Act shall affect any bill of sale executed before the commencement of this Act, and as

Form of
register.

Registrar.

Rectification
of register.

Entry of
satisfaction.

Copies may
be taken, &c.

Affidavits.

Fees.

Order and
disposition.

Rules.

Time for
registration.

Repeal of
Acts, 17 & 18
Vict. c. 36;
29 & 30 Vict.
c. 96.

(*e*) And see R. of S. C. 1883, Ord. 61, rr. 26 and 27, and Practice Master's Rules, 1880 to 1885, (25) Bills of Sale Department.

(*f*) This section is partially repealed by the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 16, *post*, p. 305.

(*g*) This section is repealed by the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 15, *post*, p. 305. It is not, however, repealed as to absolute bills of sale. *Swift v. Pannell*, 24 Ch. D. 210; 53 L. J. Ch. 341; and see *Ex parte Izard*, *In re Chapple*, 23 Ch. D. 409; 52 L. J. Ch. 302.

regards bills of sale so executed the Acts hereby repealed shall continue in force.

“Any renewal after the commencement of this Act of the registration of a bill of sale executed before the commencement of this Act, and registered under the Acts hereby repealed, shall be made under this Act in the same manner as the renewal of a registration made under this Act.”

Extent of Act. Sect. 24. “This Act shall not extend to Scotland or to Ireland.”

Forms of affidavit of renewal and register. In Schedule (A) will be found the form of affidavit of renewal referred to in section 11, and in Schedule (B) will be found a form of the register mentioned in section 12.

THE BILLS OF SALE ACT (1878) AMENDMENT ACT, 1882 (45 & 46 VICT. c. 43).

Short title. Sect. 1. “This Act may be cited for all purposes as ‘The Bills of Sale Act (1878) Amendment Act, 1882’ and this Act and the Bills of Sale Act, 1878, may be cited together as ‘The Bills of Sale Acts, 1878 and 1882.’”

Commencement of Act. Sect. 2. “This Act shall come into operation on the 1st day of November, 1882, which date is hereinafter referred to as the commencement of this Act.”

Construction of Act, 41 & 42 Vict. c. 31. Sect. 3. “The Bills of Sale Act, 1878, is hereinafter referred to as ‘the principal Act,’ and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but, unless the context otherwise requires, shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise.

Interpretation clause. “The expression ‘bill of sale,’ and other expressions in this Act, have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in section 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply.”

Bill of sale to have schedule of property attached thereto. Sect. 4. “Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule;

and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

Sect. 5. "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale."

Bill of sale not to affect after-acquired property.

Sect. 6. "Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things; (that is to say,)

Exception as to certain things.

"(1.) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed ;

Growing crops.

"(2.) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale."

Machinery, &c. substituted.

Sect. 7. "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

Bill of sale, with power to seize, except in certain events, to be void.

"(1.) If the grantor make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security ;

"(2.) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes ;

"(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises ;

"(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes ;

"(5.) If execution shall have been levied against the goods of the grantor under any judgment at law :

"Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a

judge thereof in Chambers, and such Court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just."

Bill of sale to be void, unless attested and registered.

Sect. 8. "Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

Form of bill of sale.

Sect. 9. "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

Attestation.

Repeal of s. 10, ss. 1, of Bills of Sale Act, 1878.

Sect. 10. "The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of section 10 of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed."

Local registration of contents of bill of sale.

32 & 33 Vict. c. 71, s. 60.

Sect. 11. "Where the affidavit (which under section 10 of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same or of the person against whom the process is issued to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the county court registrar in whose district such places are situate, and if such places are in the districts of different registrars to each such registrar.

"Every abstract so transmitted shall be filed, kept, and

indexed by the registrar of the County Court in the prescribed manner, and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of bills of sale registered by the registrar under the principal Act."

Sect. 12. "Every bill of sale made or given in consideration of any sum under thirty pounds shall be void."

Bill of sale under 30*l.* to be void.

Sect. 13. "All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

Chattels not to be removed or sold.

Sect. 14. "A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates" (*h*).

Bill of sale not to protect chattels against poor and parochial rates.

Sect. 15. "The 8th and 20th sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act."

Repeal of part of Bills of Sale Act, 1878.

Sect. 16. "So much of the 16th section of the principal Act as enacts that any person shall be entitled at all reasonable times to search the register and every registered bill of sale upon payment of one shilling for every copy of a bill of sale inspected is hereby repealed, and from and after the commencement of this Act any person shall be entitled at all reasonable times to search the register, on payment of a fee of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from any and every registered bill of sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected, and

Inspection of registered bills of sale.

(*h*) See as to the operation of this section the recent case of *Wickenden Local Board v. Underwood*, [1892] 1 Q. B. 836; 61 L. J. Q. B. 484; 67 L. T. 55.

such payment shall be made by a judicature stamp: Provided that the said extracts shall be limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars."

Debentures to which Act not to apply.

Sect. 17. "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

Extent of Act. Statutory form.

Sect. 18. "This Act shall not extend to Scotland or Ireland." The statutory form in the schedule to this Act will be found *post*, p. 307.

THE BILLS OF SALE ACT, 1890 (53 & 54 VICT. c. 53).

An Act to exempt certain letters of hypothecation from the operation of the Bills of Sale Act, 1882. [18th August, 1890.]

Exemption of letters of hypothecation of imported goods from 45 & 46 Vict. c. 43, s. 9.

Sect. 1. "An instrument given or executed at any time prior to such deposit, re-shipment, or delivery as hereinafter mentioned, hypothecating or declaring trusts of imported goods during the interval between the discharge of the goods from the ship in which they are imported and their deposit in a warehouse, factory, or store, or their being re-shipped for export, or delivered to a purchaser not being the purchaser giving or executing such instrument, shall not be deemed a bill of sale within the meaning of section nine of the Bills of Sale Act, 1882."

Saving of 46 & 47 Vict. c. 52, s. 44.

Sect. 2. "Nothing in this Act shall affect the operation of section forty-four of the Bankruptcy Act, 1883, in respect of any goods comprised in any such instrument as is hereinbefore described, if such goods would but for this Act be goods within the meaning of sub-section three of that section."

Short title.

Sect. 3. "This Act may be cited as the Bills of Sale Act, 1890."

THE BILLS OF SALE ACT, 1891 (54 & 55 VICT. c. 35).

An Act to amend the Bills of Sale Act, 1890. [21st July, 1891.]

Exemption of securities on imported goods from Bills of Sale Acts.

Sect. 1. "Section one of the Bills of Sale Act, 1890, shall be amended so as to read as follows: An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being re-shipped for export, or delivered to a purchaser not being the person giving or exe-

cutting such instrument, shall not be deemed a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882."

Sect. 2. "This Act may be cited as the Bills of Sale Act, *Short title.* 1891."

Forms of Bills of Sale.

1. *Statutory Form of Bill of Sale* (Schedule to Bills of Sale Act, 1882).

THIS INDENTURE made the day of between A. B. of
of the one part, and C. D. of of the other part, Witnesseth
that in consideration of the sum of £ now paid to A. B. by
C. D., the receipt of which the said A. B. hereby acknowledges [*or
whatever else the consideration may be*], he the said A. B. doth hereby
assign unto C. D., his executors, administrators, and assigns, All
and singular the several chattels and things specifically described in
the schedule hereto annexed by way of security for the payment of
the sum of £ , and interest thereon at the rate of per
cent. per annum [*or whatever else may be the rate*]. And the said
A. B. doth further agree and declare that he will duly pay to the
said C. D. the principal sum aforesaid, together with the interest
then due, by equal payments of £ on the day
of [*or whatever else may be the stipulated times or time of pay-
ment*]. And the said A. B. doth also agree with the said C. D. that
he will [*here insert terms as to insurance, payment of rent, or other-
wise, which the parties may agree to for the maintenance or defeasance
of the security*].

Provided always, that the chattels hereby assigned shall not be
liable to seizure or to be taken possession of by the said C. D. for
any cause other than those specified in section seven of the Bills of
Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said A. B.

in the presence of me

E. F.

[*Add witness' name, address, and description*].

2. *Bill of Sale, from the Sheriff, of Goods taken in Execution (i).*

THIS INDENTURE made the day of one thousand eight
hundred and between of Esquire, High Sheriff
of the county of (hereinafter called the said sheriff) of the
one part and of (hereinafter called the purchaser) of
the other part. Whereas a writ of *fieri facias* issuing out of the
Division of Her Majesty's High Court of Justice directed to
the said sheriff was received at the office of the undersheriff of the

(i) This form, for which the Author is indebted, is taken, with permis-
sion, from App. III. of Reed's Bills of Sale Acts, p. 272.

said county commanding the said sheriff that he should cause to be levied of the goods and chattels of within his bailiwick a certain debt of which had recovered against him in the said division together with the sum of for interest damages costs and charges which the said had sustained and expended by reason of his suit. And whereas the said sheriff had by virtue of the said writ seized and taken in execution certain goods and chattels of the said being in and upon the messuage buildings and premises now in the occupation of the said situate and being in the county aforesaid and hath caused the same goods and chattels to be appraised by a person of competent skill who hath valued the same at the sum of And whereas [*recite order for private sale*].

Now this indenture witnesseth that in consideration of the sum of upon the execution of these presents by the said purchaser paid to the said sheriff the receipt whereof is hereby acknowledged He the said sheriff as far as he lawfully can or may by virtue of his said office of sheriff but no further or otherwise doth hereby assign unto the said purchaser his executors administrators and assigns All and singular the goods chattels effects and things which have been taken in execution by the said sheriff by virtue of the said writ of *fiery facias* and which are specifically described in the schedule or inventory hereunder written or hereunto annexed To hold the said goods chattels effects and things unto the said purchaser his executors administrators and assigns absolutely. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

THE SCHEDULE ABOVE REFERRED TO.

Signed with the name of sheriff
of the county of , sealed with
his seal of office and delivered as his
act and deed by undersheriff of
the said county in my presence, the
effect of the above-written bill of sale
having been explained to the said
 before his execution thereof by
me the attesting solicitor.

What constitutes a Bill of Sale.

See the Bills of Sale Act, 1854, sect. 7, the Bills of Sale Act, 1878, sects. 4 and 6, the Bills of Sale Act, 1882, sects. 3 and 17, and the Bills of Sale Acts of 1890 and 1891 (*k*).

A receipt for the purchase-money of goods, with or without an inventory attached, is a bill of sale, if it is intended to

Receipt for
purchase-
money a bill

(*k*) The Bills of Sale Acts are set out *ante*, pp. 292 *et seq.*

operate as an assurance of the goods, but not otherwise. *Marsden v. Meadows*, 7 Q. B. D. 89; 50 L. J. Q. B. 536; 45 L. T. 301; *Hale v. Saloon Omnibus Co.*, 28 L. J. Ch. 777; 4 Drew. 492; and see *Re Hood, Ex parte Trustee v. Burgess*, 68 L. T. 591. Accordingly, where on the evidence there is a complete contract independently of, and previous to, the documents, and the documents cannot be looked upon as a memorandum of the agreement in the sense that they are a record of the transaction, they cannot be, within the fair construction of the words "other assurances," bills of sale, so as to require registration or to be in the form required by the Act of 1882. In other words, where there is a perfect transaction without the documents, those documents cannot be considered as bills of sale within the meaning of the Acts. *North Central Wagon Co. v. Manchester, Sheffield & Lincolnshire Rail. Co.*, 35 Ch. D. 191; 56 L. J. Ch. 609; and see *Haydon v. Brown*, 59 L. T. 330, 810; *Jones v. Tower Furnishing Co.*, 61 L. T. 84; *Manchester, Sheffield & Lincolnshire Rail. Co. v. North Central Wagon Co.*, 13 App. Cas. 554; 58 L. J. Ch. 219; *Allsop v. Day*, 7 H. & N. 457; 31 L. J. Ex. 105; *Ex parte Homan, In re Broadbent*, L. R. 12 Eq. 598 (as qualified by *Ex parte Mackay, Ex parte Brown, In re Jeavons*, L. R. 8 Ch. 643; 42 L. J. Bank. 68); *Byerley v. Prevost*, L. R. 6 C. P. 144; *Graham v. Wilcockson and Munslow*, 46 L. J. Ex. 55; *In re Baum, Ex parte Cooper*, 10 Ch. D. 313; 48 L. J. Bank. 40; *Woodgate v. Godfrey*, 5 Ex. D. 24; 49 L. J. Ex. 1; and *Preece v. Gilling, Hepworth (Claimant)*, 53 L. T. 763. See also *In re Robertson, Ex parte Lewin & Co.*, 9 Ch. D. 419; 47 L. J. Bank. 94; *Ex parte Newitt, In re Garrud*, 16 Ch. D. 522; 51 L. J. Ch. 381; *Newlove v. Shrewsbury*, 21 Q. B. D. 41; 57 L. J. Q. B. 476; *Shepherd v. Pulbrook*, 59 L. T. 288; and *French v. Bombernard*, 60 L. T. 48.

A memorandum of an agreement may be a bill of sale, as, for example, where the tenant of a farm sold certain growing crops, giving the purchaser a document signed by both of them, whereby it was stated that the purchaser agreed to take and the tenant to assign the crops therein described for 6/ an acre, and where it was held that such document was a bill of sale within the meaning of the Bills of Sale Act, 1854. *Brantom v. Griffiths*, 46 L. J. Q. B. 408. See also *In re Roberts, Evans v. Roberts*, 56 L. J. Ch. 952; and, in particular, the judgment in that case of Kay, J. But a parol agreement to give a bill of sale does not require registration under the Bills of Sale Act,

of sale if intended as an assurance of goods.

Memorandum of agreement may be a bill of sale.

Registration not required of parol

agreement to give bill of sale.

1878, and a bill of sale, given in pursuance of such an agreement, is not void under the Act by reason of the non-registration of the agreement. *Ex parte Hauxwell, In re Hemingway*, 23 Ch. D. 626.

Document, recording transaction and regulating rights of pledgee of goods, not a bill.

In *In re Hardwick, Ex parte Hubbard*, (C. A.) 17 Q. B. D. 690; 55 L. J. Q. B. 490, the claimant Hubbard agreed to lend moneys to Hardwick on the security of certain machines which Hardwick took to Hubbard; the moneys were advanced and the machines left with Hubbard. Certain documents, concurrently signed by the borrower, acknowledged the receipt of the machines, and contained agreements to repay the loans and, in default, for the lender to sell. It was held, that the transaction being one of a pledge only the document did not constitute a bill of sale and was not within the Act of 1878 or that of 1882. And see *Hilton v. Tucker*, 39 Ch. D. 669; 57 L. J. Ch. 973. See also as to pledge of goods, *Grigg v. National Guardian Assurance Co.*, [1891] 3 Ch. 206; 61 L. J. Ch. 11.

License to take possession of goods as security for debt, not in statutory form, void.

In *In re Townsend, Ex parte Parsons*, 16 Q. B. D. 532; 55 L. J. Q. B. 137, a document in the following form—

“To J. Parsons, Estate Agent.

“Sir,—I hereby authorize and empower you to take immediate possession of all my goods, chattels, plate, and other effects at No. 26, Eaton Place, Kemp Town, Brighton, and to sell the same either by public auction or private contract as soon as conveniently may be, and out of the proceeds thereof I authorize you to deduct any moneys due from me to you and any accounts due from me to the trades-people in and about Kemp Town, and after deducting all proper charges for the sale of my effects and any moneys advanced by you, to pay over to me the balance thereof.

“T. E. TOWNSEND.”

was held to be, within the words of sect. 4 of the Act of 1878, a license to take possession of personal chattels as security for any debt and to come within the Act of 1882, and not being in the prescribed form to be void. In the same case the Court disapproved of *In re Hall, Ex parte Close*, 14 Q. B. D. 386; 54 L. J. Q. B. 43; and *In re Cunningham*, 28 Ch. D. 682; 54 L. J. Ch. 448, so far as they lay down that a transaction which cannot by any possibility be brought within the form in the schedule to the Bills of Sale Act, 1882, is a transaction to which the Act does not apply; and see as to license to take possession of chattels, *Pulbrook v. Ashby*, 56 L. J. Q. B. 376; 35 W. R. 779; *Stercus v. Marston*, 60 L. J. Q. B. 192; 39 W. R. 129; *In re Watson, Ex parte The Official Receiver*, 25 Q. B. D. 27; 59

L. J. Q. B. 394; and as to authority to take possession of and sell goods, see the important case of *Charlesworth v. Mills*, (C. A.) 25 Q. B. D. 421; (II. L.) W. N. (1892), 63; [1892] A. C. 231. An agreement making goods in an agent's hands security for his advances to his principal has, moreover, been held not to be a bill of sale. *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352.

As to the operation of an agreement for hire as a bill of sale under the 1854 Act, see *In re Cravcour, Ex parte Robertson*, 9 Ch. D. 419; 47 L. J. Bank. 94; and *Ex parte Emmerson, In re Hawkins*, 41 L. J. Bank. 20; 20 W. R. 110. See also as to hiring agreement, *Mudell v. Thomas*, [1891] 1 Q. B. 230; 60 L. J. Q. B. 227; and as to hiring and purchase agreement, *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 638; 60 L. J. Q. B. 493. An assignment by a furniture dealer of money coming due to him under a hire purchase agreement is not, however, within the purview of the Bills of Sale Act, 1878, being only the assignment of a contract and not property passing in the goods. *In re Davis & Co., Ex parte Rawlings*, (C. A.) 22 Q. B. D. 193; and see under this head, *Coburn v. Collins*, 35 Ch. D. 373; 56 L. J. Ch. 504; *Palbrook v. Ashby & Co.*, *ante*; and *Redhead v. Westwood*, 59 L. T. 293.

Agreement for hire.

Assignment of money due under hire purchase agreement not a bill.

An agreement by a clause in an ordinary building contract that all building and other materials brought by the builder upon the land shall become the property of the landowner is not a bill of sale within the Bills of Sale Act, 1878. *Reeves v. Barlow*, 12 Q. B. D. 436; and see *Brown v. Bateman*, L. R. 2 C. P. 272; 36 L. J. C. P. 134; *Ex parte Newitt, In re Garrud*, 16 Ch. D. 522; 51 L. J. Ch. 381; and *Blake v. Izard*, 16 W. R. 108. But a mortgage deed of land and buildings in course of erection thereon by a builder, which gives a power to sell the building materials independent of the power to enter upon and take possession of the premises, and exercisable without the latter power being exercised, is an assurance of personal chattels or a license to take possession of personal chattels as security for a debt within the meaning of sect. 4 of the Bills of Sale Act, 1878, and therefore is a bill of sale and is subject to the operation of sect. 8 of the 1882 Act in respect of the personal chattels comprised therein. *Climpson v. Coles*, 23 Q. B. D. 465; 58 L. J. Q. B. 346 (*Brown v. Bateman, ante*; *Blake v. Izard, ante*; *Ex parte Newitt, In re Garrud, ante*; *Reeves v. Barlow, ante*, distinguished). It will be observed that the case of *Climpson v.*

Agreement in building contract that materials become property of landowner not a bill.

When mortgage deed of land and buildings by builder a bill of sale of chattels.

Coles was decided exclusively on the fact that a power was given to sell the building materials independent of the power to enter upon and take possession of the premises, and the Court appears to have expressed the opinion (at p. 471) that the same consideration applied to a mortgage as to an ordinary building agreement. But Wright, J., in *Church v. Sage*, 67 L. T. 801, while reconciling his judgment with the judgment in *Climpson v. Coles*, distinguished the case of *Church v. Sage* from such cases as *Brown v. Bateman*, ante; *Blake v. Izard*, ante; and *Reeves v. Barlow*, ante, on the ground that in those cases the decision was only that an ordinary building agreement between a landowner and builder was not brought within the Bills of Sale Acts merely by reason of a provision that the plant and materials, when brought upon the land, should be considered as annexed to the land, whereas in the case of *Church v. Sage* the assignment was not to the owner but to a stranger as security for a loan.

Two documents forming one security must be regarded as one transaction.

Security where lender takes immediate possession not a bill.

Nor when it cannot be expressed in statutory form.

Second bill remedying first.

Post-nuptial settlement, when a bill within 1854 Act.

Memorandum of agreement for marriage settlement not a bill.

Where two instruments together constitute one security, they must be regarded as one transaction for the purpose of ascertaining whether they are or are not within the Bills of Sale Acts. *In re Cunningham & Co.*, 28 Ch. D. 682; 54 L. J. Ch. 448. Where security is given for the repayment of an advance, and the lender takes immediate possession of the goods pledged, the security is not within the Bills of Sale Acts. *Ib.* Moreover, when the security is of such a character that it could not possibly be expressed in the form in the Schedule to the 1882 Bills of Sale Act it is not a bill of sale within that Act. *Ib.*

As to the case of a debtor giving a second or fresh bill of sale with the sole object of remedying a defect in the first bill of sale, see the recent case of *In re Tweedale, Ex parte Tweedale*, [1892] 2 Q. B. 216; 61 L. J. Q. B. 505.

A post-nuptial settlement by which a man in consideration of natural love conveyed goods and chattels to trustees for the benefit of his wife and children was within the provisions of the 1854 Act. *Fowler v. Forster*, 28 L. J. Q. B. 210. But a memorandum of agreement (not under seal) for a marriage settlement is a "marriage settlement" within the meaning of that expression in sect. 4 of the Bills of Sale Act, 1878, and does not, therefore, require registration under the Act. *Wenman v. Lyon & Co.*, [1891] 2 Q. B. 192; 60 L. J. Q. B. 663. *Per Lopes, L. J.*, "It has been argued that the expression 'marriage settlement' does not include an ante-nuptial agreement for a

settlement. I have no doubt that it does. It seems to me to include not merely a marriage settlement by deed, but every agreement which has the intention and effect of creating a trust in consideration of the intended marriage."

A merely equitable assignment of chattels is within the Bills of Sale Acts of 1854 and 1878. *Edwards v. Edwards*, (C. A.) 2 Ch. D. 291; 45 L. J. Ch. 391.

Bills of sale given by a company are not excepted from the provisions of the Bills of Sale Acts. *In re Cunningham & Co.*, ante.

As to attornment, it will be observed that by the 1878 Act, sect. 6, "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress. Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." And see as to attornment, *Hall v. Comfort*, 18 Q. B. D. 11; 56 L. J. Q. B. 185; *In re Willis, Ex parte Kennedy*, 21 Q. B. D. 384; 57 L. J. Q. B. 634; *Pulbrook v. Ashby & Co.*, 56 L. J. Q. B. 376; 35 W. R. 779; *Mumford v. Collier*, 25 Q. B. D. 279; 59 L. J. Q. B. 552; and *Green v. Marsh*, (C. A.), [1892] 2 Q. B. 330; 61 L. J. Q. B. 442. Having regard to the Bills of Sale Acts, an attornment clause has not now the effect it formerly had of providing the additional means of raising mortgage money by way of distress. But such a clause is not altogether inoperative, for, as is shown by the above case of *Mumford v. Collier*, ante, it is useful in enabling the mortgagee to obtain possession, and its retention on that account is therefore, as a general rule, useful to a mortgagee. It is not the relationship of landlord and tenant but only part of its incidents, namely, that of distress, which is prohibited.

As to exemption of letters of hypothecation of imported goods from the operation of the 1882 Act, see the Bills of Sale Act, 1890, and as to exemption of securities on imported goods from

Equitable assignment of chattels within 1878 Act.

Bills by companies not excepted from Acts.

Attornment giving powers of distress subject to 1878 Act.

Proviso as to mortgages in certain cases.

Exemption of letters of hypothecation and securities

on imported goods.

the operation of the Bills of Sale Acts, 1878 and 1882, see the Bills of Sale Act, 1891.

Debentures.

With regard to debentures, non-compliance with the requirements of the Bills of Sale Act, 1878, avoided debentures in respect of chattels, thereby charged, as against execution creditors or the holder of a subsequent, but duly registered, bill of sale, and even with notice of the debenture (*Connelly v. Steer*, 7 Q. B. D. 520; *Edwards v. Edwards*, 2 Ch. D. 291; 45 L. J. Ch. 391; and *Lyons v. Tucker*, 7 Q. B. D. 523), although good as between the grantor and grantee (*Davis v. Goodman*, 5 C. P. D. 128), or a liquidator. *In re Marine Mansions Co.*, L. R. 4 Eq. 601; 37 L. J. Ch. 113; and *In re Asphaltic Wood Pavement Co.*, W. N. (1883) 152; 49 L. T. 159. But it will be observed that by sect. 17 of the 1882 Act, "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company." As to what is and what is not a debenture within the meaning of this section, Chitty, J., in *Edmonds v. Blaina Furnaces Co.*, 36 Ch. D. 215; 56 L. J. Ch. 815, says: "Now, ought I to put any narrow restrictive interpretation upon the term 'debenture' in this section? I see no reason why I should. I see one reason, though it may not cover all the ground, why I should not, and it is this, the two great classes of existing companies, viz., those established by Act of Parliament, incorporating the Companies Clauses Act of 1845, and those incorporated under the Companies Act, 1862, are bound by statutory provisions to keep a register of their debentures, using that term in the sense already explained [*i. e.*, an instrument generally, if not always, importing an obligation or covenant to pay]. The legislature, finding these existing provisions for registration, may have considered it was not necessary to require the registration under the Bills of Sale Acts of the secured debentures of an incorporated company. The legislature may have acted on this ground, or may have taken the broader view that the secured debentures of incorporated companies were not within the mischief intended to be remedied by the Bills of Sale Act. In determining what is or is not a debenture within the section, I am not bound to hold that an instrument is a debenture because it is called a debenture by the company issuing it, nor to hold it is not a debenture because it is not so called by the company. I must look at the substance of the instrument itself, and without the assistance of

Debentures to which 1882 Act not to apply.

What is a debenture within sect. 17.

any precise legal definition, form the best opinion I can, whether the instrument does or does not fall within the exemption of the section." Moreover, Chitty, J., in *Ley v. Abercorris Slate and Slab Co.*, 37 Ch. D. 260; 57 L. J. Ch. 202, says: "Now looking at this section [17] once more I observe that it may be divided into four parts, it relates first to the thing called a 'debenture'; secondly, it, the 'debenture,' must be 'issued'; thirdly, it must be issued by a particular company, that is, a 'mortgage, loan, or other incorporated company.' The term 'loan' is a little awkward, and I do not know what is meant by a 'loan company,' but I pass it by, as also the term 'mortgage' company, which is also not quite clear, because I am satisfied that the words 'or other incorporated company' are large enough and must be construed as they stand, and are not to be cut down by the context. Then the fourth part is that the debenture must be 'secured upon the capital stock or goods, chattels and effects of such company.' The material words here are 'goods, chattels and effects.' In my opinion a 'debenture' means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a 'debenture.' I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art. It must be 'issued,' but 'issued' is not a technical term, it is a mercantile term well understood; 'issue' here means the delivery over by the company to the person who has the charge. As to what 'company' means, I have already said it must be by 'an incorporated company,' and it must be secured on the 'goods, chattels and effects' of the company. Having thus gone through the section once again, I find I cannot add anything further on this point to what I have already stated in *The Blaina Furnaces Case*." See also *Topham v. Greenside Co.*, 37 Ch. D. 281; 57 L. J. Ch. 583. It has been, moreover, since held that a debenture of an incorporated company is not a bill of sale requiring registration either under the Bills of Sale Act, 1878, or that of 1882. *Read v. Joannon*, 25 Q. B. D. 300; 59 L. J. Q. B. 544 (*dicta* of Grove, J., in *Jenkinson v. Brandley Mining Co.*, 19 Q. B. D. 568; 35 W. R. 834, disapproved). *Per* Lord Coleridge, C. J., in *Read v. Joannon*, *ante*, "The words therefore of section 17, 'Nothing in this Act shall apply to any debentures,' really mean, 'Nothing in this Act or in the principal Act shall apply to any debentures'"; and *per* Wills, J., "I think that the

words [‘other incorporated company’] were meant to include all incorporated companies of every description. It seems to me, therefore, that the only necessity for the registration of a bill of sale given by way of security arises from sect. 8 of the Act of 1882, and that debentures of incorporated companies, if they are bills of sale at all, are expressly exempted from that necessity by sect. 17 of the Act.” See also *In re Standard Manufacturing Co.*, [1891] 1 Ch. 627; 60 L. J. (Ch. 292, in which case *Read v. Joannon*, *ante*, is followed and approved, and *Jenkinson v. The Brandley Mining Co.*, *ante*, overruled.

“Covering deed” not a debenture within sect. 17.

The ordinary debenture trust or covering deed has been held not to be a debenture within the meaning of sect. 17 of the Bills of Sale Act, 1882. *Brockhurst v. Railway Printing and Publishing Co.*, W. N. (1884), 70; and *Ross v. Army and Navy Hotel Co.*, 34 Ch. D. 43; 55 L. T. (C. A.) 472. It was also held by the Court of Appeal in *Ross v. Army and Navy Hotel Co.*, *ante*, that assuming the covering deed to be void for want of registration under the Bills of Sale Acts, the intention to give the debenture holders a valid charge, within the meaning of the Bills of Sale Act, 1882, s. 17, on the property comprised in that deed, was manifest on the face of the debentures, issued by the defendant company, read in conjunction with the annexed condition, and amounted to an equitable contract, which would be carried into effect to give a charge upon all the property of the company; and, accordingly, that the chattels, intended to be charged with the money due on the original debentures, were subject to an equitable charge in favour of the holders of those debentures. *Per* Cotton, L. J.: “Although the covering deed is void under that Act [Bills of Sale Act, 1882], there is in the debenture itself a contract that the debenture holders shall have a charge upon what for present purposes I will call all the property of the company.” And see on this point, *Levy v. Abercorris Slate and Slab Co.*, *ante*, including the judgment therein of Chitty, J. (l).

Priority of debentures against general creditors;

A debenture charging all the property present and future of a company, although expressed to be intended to operate as a first charge upon the property, will be construed to be a general floating security, operating as a first charge against the general

(l) *Ross v. Army and Navy Hotel Co.*, *ante*, was distinguished in *Jenkinson v. Brandley Mining Co.*, *ante*, but that case has, it will be observed, been since overruled by *In re The Standard Manufacturing Co.*, *ante*.

creditors of the company over the property of the company as it exists at the time at which the debenture comes into operation. *Wheatley v. Silkstone and Haigh Moor Coal Co.*, 29 Ch. D. 715; 54 L. J. Ch. 778. And as to priority of debentures as against execution creditors see *Debenture Holders of John Wested & Co. v. Swansea Bank*, 5 T. L. R. 332; *Ex parte Australian Investment Co., In re Queensland Mercantile Co.*, 2 Meg. 394, North, J.; *In re Standard Manufacturing Co.*, [1891] 1 Ch. 627, 640; and *In re Opera*, [1891] 3 Ch. 260; 60 L. J. Ch. 839.

against
execution
creditors.

What may be the Subject of a Bill of Sale.

See the Bills of Sale Act, 1854, ss. 1 and 7; the Bills of Sale Act, 1878, ss. 4, 5, and 7; and the Bills of Sale Act, 1882, ss. 3, 5, and 6 (*m*); and as to growing crops under the 1854 Act, see *Brantom v. Griffiths*, 2 C. P. D. 212; 46 L. J. C. P. 408; and *In re Philips, Ex parte The National Mercantile Bank*, 16 Ch. D. 104; 50 L. J. Ch. 231.

The following may be taken as a brief summary of the general law applicable to after-acquired property, viz.:—At law assignments of after-acquired property not having a potential existence must be perfected by seizure or ratification of such assignment on acquisition of such property. But in equity (to quote Lord Bacon's maxim on this point) "a conveyance of property to be acquired *in futuro* operates nothing unless there is some new act done by the grantor." Property to be afterwards acquired may be the subject-matter of a valid assignment for value immediately on such property being acquired and without any seizure or ratification, provided—(a) the assignment be absolute and not a mere agreement to assign; (b) such contract be one which a Court of Equity would specifically enforce, or, in other words, that the effects be sufficiently specified to make the assignment operate in equity; and (c) such property be so described as to be capable of being identified. The leading cases on this subject are *Hope v. Hayley*, 25 L. J. Q. B. 155; *Carr v. Allatt*, 27 L. J. Ex. 385; *Holroyd v. Marshall*, 10 H. L. Cas. 191; 33 L. J. Ch. 193; 7 L. T. 172; *Belding v. Read*, 3 H. & C. 955; 34 L. J. Ex. 212; *Reeve v. Whitmore*, 33 L. J.

Assignments
of after-
acquired
property.

(*m*) The Bills of Sale Acts are set out, *ante*, pp. 292 *et seq.*

Ch. 63 (and see in particular, the judgment of Lord Westbury in the latter case); *Leatham v. Amor*, 47 L. J. Q. B. 581; 38 L. T. 785; and *Lazarus v. Andrade*, 5 C. P. D. 318; 49 L. J. C. P. 847. See also *Joseph v. Lyons*, 15 Q. B. D. 280; 54 L. J. Q. B. 1; *Hallas v. Robinson*, 54 L. J. Q. B. 364; *Collyer v. Isaacs*, 19 Ch. D. 342; 51 L. J. Ch. 14; *Clement v. Mathews*, 11 Q. B. D. 808; 52 L. J. Q. B. 772; and *Tailby v. The Official Receiver*, 13 App. Cas. 523; 58 L. J. Q. B. (H. L.) 75.

Bill of sale in respect of after-acquired property to be void, except as against grantor.

So much for the general law. It will be, however, observed that by sect. 5 of the Bills of Sale Act, 1882, "save as herein-after mentioned, a bill of sale (*n*) shall be void, except as against the grantor, in respect of any personal chattels, specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale." But by sect. 6, "Nothing contained in the foregoing section of this Act shall render a bill of sale void in respect of any of the following things; (that is to say), (1) Any growing crops separately assigned or charged when such crops were actually growing at the time when the bill of sale was executed. (2) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale." Referring to sect. 5 of the 1882 Act, Lindley, L. J., says in *Roberts v. Roberts*, (C. A.) 13 Q. B. D. 794; 53 L. J. Q. B. 313: "The next objection taken was, that the bill of sale was void because it does not follow the form in the schedule, inasmuch as it comprises after-acquired property; but, on looking at the Act, I find a section specifically dealing with that subject. If the bill of sale contravenes the provisions of sects. 8 and 9, it is void *in toto*; but sect. 5, which deals specifically with the subject of after-acquired property, enacts that a bill of sale shall be void, in respect of the matters dealt with in that section, except as against the grantor; so that there may

Exception as to growing crops;

and substituted fixtures, &c.

(*n*) It will be observed that the operation of the Bills of Sale Act, 1882, is confined to bills of sale given by way of security for the payment of money or, in other words, that it does not affect bills of sale given by way of absolute transfer. Sect. 3 of that Act; and see *Swift v. Pannell*, 24 Ch. D. 210; 48 L. T. 351; and *Casson v. Churchley*, 53 L. J. Q. B. 335; 50 L. T. 568.

be a bill of sale comprising after-acquired property, which may be valid as between the grantor and grantee, and yet be void as far as other persons are concerned; and it seems to me that this construction gives to sects. 4 and 5 their proper effect." And see the recent and important case bearing on sect. 5 of the 1882 Act of *Tuck v. Southern Counties Deposit Bank*, 42 Ch. D. 471; 58 L. J. Ch. 699. See also on this subject, *Carpenter v. Deen*, 23 Q. B. D. 566; W. N. (1889) 186; *Reeves v. Barlow*, 12 Q. B. D. 436; *Joseph v. Webb*, 1 C. & E. 262; *In re Clarke*, *Coombe v. Carter*, 36 Ch. D. 348; 56 L. J. Ch. 981; *Brown v. Bateman*, L. R. 2 C. P. 272; 36 L. J. C. P. 134; *Thomas v. Searles*, [1891] 2 Q. B. 408; 60 L. J. Q. B. 722; and *In re Sarl, Ex parte Williams*, [1892] 2 Q. B. 591; 67 L. T. 597; W. N. (1892) 102.

Formalities to be observed.

(1.) *Statement of Consideration.*

See the Bills of Sale Act, 1878, sect. 8, and the Bills of Sale Act, 1882, sect. 8 (o).

The consideration for a bill of sale, required to be set forth by the Bills of Sale Act, 1878, sect. 8, is the amount of the consideration which has actually passed from the grantee to the grantor. Accordingly, where that is stated, the consideration is truly set forth (*Hamlyn v. Betteley*, 5 C. P. D. 327; 42 L. T. 373); and the statutory requirements will be satisfied if the statement of the consideration is substantially accurate. So, if it states the true legal effect or the true business effect of the transaction, strict literal accuracy of statement is not necessary. *Ex parte Johnson*, *In re Chapman*, 26 Ch. D. 338; 53 L. J. Ch. 762; *Hughes v. Little*, 18 Q. B. D. 32; 55 L. T. 476. Nor need the history of the transaction be stated, but only the consideration for the bill of sale. *Ex parte Allam*, *In re Monday*, 14 Q. B. D. 43. Therefore, the motive for an advance is not material in deciding whether the consideration for a bill of sale is truly stated. *Ex parte Ord*, *In re Fothergill*, 43 L. T. 637. Moreover, whilst the consideration which the 1878 Act requires

Amount actually passed from grantee to grantor must be set forth.

Not necessary

(o) The Bills of Sale Acts are set out *ante*, pp. 292 *et seq.*

to set out every collateral bargain connected with advance.

Bill of sale must set forth true consideration between parties.

to be stated in the deed is the real consideration as between the grantor and the grantee—that which would have been properly stated in the deed independently of the Acts—the Act does not require every collateral bargain or stipulation connected with the advance to be set out. *Ex parte The National Mercantile Bank, In re Haynes*, 15 Ch. D. 42; and see *Thomas v. Searles*, [1891] 2 Q. B. 408; 60 L. J. Q. B. 722.

Ex parte The National Mercantile Bank, In re Haynes, ante, was considered and distinguished in the case of *Ex parte The Charing Cross Advance and Deposit Bank, In re Parker*, 16 Ch. D. 35; 50 L. J. Ch. 157. In the latter case a duly attested and registered bill of sale purported to be executed in consideration of an advance of 120%, whereas, in fact, 90% only was advanced to the grantor and 30% retained, part in payment of expenses and the rest for interest to be paid on the money advanced under the deed, and a receipt for 90% signed by the grantor at the foot of the bill of sale explained the true consideration. It was held that the true consideration was not set out in the bill of sale and that it could not be cured by such receipt. *Per Cotton, L. J.*: “The first point to be considered is whether the deed, independently of the receipt clause, does comply with the terms of the Act requiring the statement of the consideration of every bill of sale. In my opinion it does not. It states that 120% was advanced, as meaning actually paid by the grantees to the grantor, whereas, in fact, 90% only was advanced to the grantor, and 30% retained, part in payment of expenses, and the rest for interest to be paid on the money advanced under the deed. The case of *Ex parte The National Mercantile Bank* has been referred to, as to which, in my opinion, there can be no question. But this is not like that case, for there the retainer was for the purpose of satisfying a then existing debt, independently of the transaction of loan. The great distinction between the two cases is this, that here the whole liability ‘for interest and expenses’ arises out of the transaction of loan which the bill of sale completed and rendered effectual. There the debt existed independently, and would have so remained if the loan secured by the bill had not been made. I think that the kind of retainer in this case was the very thing aimed at by the Act. The object was to prevent the giving of a security for a sum said to be advanced when, in fact, a large part was retained by the grantee. Independently, therefore, of the receipt clause, there is an end of the case. But

it is said that we ought to look at the receipt clause; and if we do so, the true consideration is set forth as required. It does state honestly the facts of the case. But we must be bound by the Act, and the Act requires the bill of sale to set forth the consideration. It is impossible in this case to say that the bill of sale sets forth the consideration. The receipt is no part of the deed. It is said that it may be used to correct the statement in the deed, but that is not required by the Act. Here it is desired to refer to another document, not to correct an insufficient description in the bill of sale, but entirely to contradict a statement contained in the bill of sale. The Act requires the bill of sale truly to state the consideration. It has not done so, and I cannot say that because possibly no harm may be done in this particular case we ought not to give effect to the fair construction of the Act." *Per James, L. J.*: "In the case of *Ex parte The National Mercantile Bank, In re Haynes*, we came to the conclusion that the true consideration was, in fact, set forth, that the loan stated was, in fact, a loan of 2,050*l.*, and it did not make it the less a loan of that amount, that by a collateral agreement 550*l.*, part of it, was to go to pay a debt actually due at the time from the grantor to the grantees, and not arising out of the then transaction between the parties. In the present case there was really an evasion of the provisions of the Act, and it is not at all like *Ex parte The National Mercantile Bank.*" In other words, to comply with sect. 8 of the 1878 Act a bill of sale must show on the face of it the true agreement between the parties and must not be dependent for its real effect upon some other instrument. And see *Sharp v. McHenry*, *Sharp v. Brown*, 38 Ch. D. 427; 57 L. J. Ch. 961; *Ex parte Carter, In re Threapleton*, 12 Ch. D. 908; 41 L. T. 37; *Carrard v. Meek*, 43 L. T. 760; *Ex parte Challinor, In re Rogers*, 16 Ch. D. 260; 51 L. J. Ch. 476; *Ex parte Firth, In re Cowburn*, 19 Ch. D. 419; 51 L. J. Ch. 473; *Hamilton v. Chaine*, 7 Q. B. D. 1, 319; 50 L. J. Q. B. 456; *In re Spindler, Ex parte Rolph*, 19 Ch. D. 98; 51 L. J. Ch. 88; and *Ex parte Bolland, In re Roper*, 21 Ch. D. 543; 52 L. J. Ch. 113; as also *In re Cann*, 13 Q. B. D. 36 (where *Ex parte Firth, ante*, is distinguished); and *Richardson v. Harris*, 22 Q. B. D. 268 (where *Ex parte The National Mercantile Bank, ante*, is discussed).

A verbal agreement not to register a bill of sale in consideration of increased bonus is a mere collateral agreement and forms no part of its consideration. It is accordingly unnecessary to

Unnecessary to state verbal agreement not to register.

state it in the deed. *Ex parte Popplewell, In re Storey*, 21 Ch. D. 73; 52 L. J. Ch. 39.

Advance by instalments may be stated.

If the advance is by instalments, the fact may be so stated. *Ex parte Berwick, In re Young*, 43 L. T. 576; W. N. (1880), 187. See, however, on this point *The Credit Co. v. Pott*, 6 Q. B. D. 295; 50 L. J. Q. B. 106; and *In re Hochaday, Ex parte Nelson*, 55 L. T. 819, affirmed on appeal, 35 W. R. 264; W. N. (1887), 7.

Bill for 30l., with immediate repayment of part, may be valid.

In the case of *Davis v. Usher*, 12 Q. B. D. 490; 53 L. J. Q. B. 422, the plaintiff applied to the defendant for an advance of 15l. on security of a bill of sale of his (plaintiff's) furniture, and, in order to provide for this and at the same time avoid the operation of sect. 12 of the 1882 Bills of Sale Act (whereby, it will be observed, bills of sale are void if given for a consideration under 30l.), it was mutually agreed that, as one of the terms of such loan, 15l. of such 30l. should be repaid on demand and 15l. by instalments. A bill of sale embodying such terms was accordingly granted and the above arrangement was duly carried out. It was held, in the absence of evidence that the transaction was a sham, that the bill of sale was valid. In this case the facts and evidence were by mutual consent set out in a special case; and, referring thereto, Smith, J., in his judgment said: "On those undisputed facts we are asked to infer that the bill of sale was necessarily for a consideration less than 30l. If the case had been tried by a jury much might have been urged to show that 15l. only was lent, and the jury would have been asked to say whether the transaction was real or not. But in this special case we can only draw the inference, which ought to be drawn from the facts standing unimpeached, and on that view I come to the conclusion that the bill of sale was not given for less than 30l."

Consideration not "truly set forth" when amount not "then owing."

In *Mayer and Fulda v. Mindlerick*, 59 L. T. 400, the bill of sale purported to be given for a sum of 312l. "then owing" by the grantor to the grantee. The material facts were as follows:—The grantee of the bill of sale, at the request of the grantor, signed certain bills of exchange, drawn on the grantor and made payable to creditors of the grantor, which were intended to secure a composition made by the latter with his creditors. These bills were accepted by the grantee, amounting to the sum of 126l., being part of the alleged consideration. There was an arrangement between the parties that the grantee should be the person to pay these bills when due, and in point of fact the bills

were afterwards duly paid by the grantee as they became due. It was admitted that the transaction was a *bona fide* one, and that there was no intention to mislead. At the time of the execution of the bill of sale the bills were not then due and the grantee had not paid them. It was held, that the sum of 126*l.*, the amount of the bills accepted by the grantee of the bill of sale, was not "then owing" by the grantor to the grantee, and that, therefore, the consideration was not "truly set forth" and that consequently the bill of sale was bad. And see as to current bills, *Cochrane v. Moore*, 25 Q. B. D. 57; 59 L. J. Q. B. 377. See, moreover, as to "statement of consideration," *Counsell v. London and Westminster Loan and Discount Co.*, 19 Q. B. D. 512; 56 L. J. Q. B. 622; as also the judgment of Brett, M. R., in *Roberts v. Roberts*, (C. A.) 13 Q. B. 794; 53 L. J. Q. B. 313.

An untrue statement of the consideration is not a deviation from the form in the schedule to the Act of 1882, and therefore does not render the bill wholly void under sect. 9, but only in respect of the personal chattels comprised therein under sect. 8. *Heseltine v. Simmons*, [1892] 2 Q. B. 547; W. N. (1892) 137.

Untrue statement of consideration not a deviation from statutory form.

(2.) *Description of Chattels.*

See the Bills of Sale Act, 1882, sect. 4, *ante*, p. 302.

A schedule to a bill of sale which contained the description "household furniture and effects, implements of husbandry" has been held insufficient to convey the goods so described for the schedule must contain such an inventory as is usual in business, separating the classes of articles comprised in it one from the other, although it need not contain a detailed description of each article. *Roberts v. Roberts*, (C. A.) 13 Q. B. D. 794; 53 L. J. Q. B. 313. *Per* Brett, M. R.: "The [1882] Act was passed with the intention of meeting a not uncommon mischief which arose upon well known instruments, and the legislature intended to put an end to the evils which arose from those general descriptions which specified no particular articles; so that it seems to me a specific description must mean such an inventory as is mentioned in the section [sect. 4], and as is well known in business. Such an inventory would contain a specific description of each class of goods mentioned in it, although not a detailed description of each article contained in it. What the statute requires is that amount of separation from one class of

Personal chattels must be specifically described in schedule.

articles from another, which any business inventory would give; so that any schedule which does not describe the things contained in it in such a way must be considered to be an unsatisfactory and insufficient schedule." And see *Witt v. Banner*, 20 Q. B. D. (C. A.) 114; 56 L. J. Q. B. 550, in which case Wills, J., in referring to the following description, "Four hundred and fifty oil paintings in gilt frames, three hundred paintings unframed, twenty water-colours unframed, and twenty gilt frames," says: "The word 'specifically' was certainly intended to mean something sufficiently specific to enable the parties to a bill of sale to identify the articles assigned, and to avoid disputes as to what were and what were not included in the assignment. The construction of the term 'specific' must, of course, be reasonable, neither too rigid nor too lax. I do not intend to attempt to define what description will satisfy the term; but for the purpose of the present case, I am of opinion that the description is not sufficient, and, if allowed to stand, would lead to the retention of all the mischief and inconvenience the Act of Parliament was intended to do away with. How can it be contended that in accordance with the present description it can be seen or known to what articles it applies? The state of things is by no means the same here as that which existed in *Roberts v. Roberts* [*ante*], for this is an assignment of part only of a picture-dealer's stock; and what ingenuity can say which the 450 pictures may be, when perhaps there are a thousand more on the premises? How can they be identified?" (This decision was affirmed by the Court of Appeal, 20 Q. B. D. 114.) Moreover, a description of chattels as "21 milch-cows" has been held not to be a sufficient specific description in a bill of sale, although given by a dairyman, to satisfy sect. 4 of the Bills of Sale Act, 1882 (*Carpenter v. Deen*, 23 Q. B. D. 566; *Witt v. Banner*, *ante*, distinguished), although in *Hickley v. Greenwood*, 25 Q. B. D. 277; 59 L. J. Q. B. 413, the description of the assigned chattels as "Roan horse, drummer, brown mare and foal; three rade carts" was held sufficient in the absence of evidence of facts showing that the description was not specific (*Witt v. Banner*, *ante*, and *Carpenter v. Deen*, *ante*, distinguished). Again, in the recent case of *Davidson v. Carlton Bank*, [1893] 1 Q. B. 82; 41 W. R. 132 (C. A.), a bill of sale was given in respect of furniture and other chattels. The schedule annexed to the bill specified the furniture and chattels in each room of the house. Under the heading "study" was the item

“eighteen hundred books as per catalogue.” No evidence was given that there was any difficulty in identifying the books. It was held, that the books were specifically described in the schedule within sect. 4 of the 1882 Act.

But the 1882 Act does not require a description of the place where the assigned goods are to be given in the bill of sale. *Ex parte Hill, In re Lane*, 17 Q. B. D. 74. It is an essential feature of the statutory form of bills of sale that all the chattels assigned should be described in the schedule. Accordingly, a bill of sale, given by way of security for the payment of money, which purported to assign certain chattels specifically described in the schedule thereto “together with all other chattels the property of the grantor then in or about certain premises and also all chattels which might during the continuance of the security be in or about the same or any other premises of the grantor,” was held void under the Act of 1882. *Thomas v. Kelly*, 13 App. Cas. 506; 58 L. J. Q. B. (H. L.) 66.

All the assigned chattels must be described in schedule.

(3) *Defeasance, &c.*

See the Bills of Sale Act, 1854, s. 2, the Bills of Sale Act, 1878, s. 10, sub-s. 3, the Bills of Sale Act, 1882, s. 9 (*p*), and the statutory form in the schedule to the latter Act, *ante*, p. 307. See also under this head, *Robinson v. Collingwood*, 34 L. J. C. P. 18; *Ex parte Southam, In re Southam*, L. R. 17 Eq. 578; 43 L. J. Bank. 39; *Ex parte Collins, In re Lees*, L. R. 10 Ch. 367; 44 L. J. Bank. 78; *Ex parte Popplewell, In re Storey*, 21 Ch. D. 73; 52 L. J. Ch. 39; *Carpenter v. Deen*, 23 Q. B. D. 566; W. N. (1889) 186; *Thomas v. Scarles*, [1891] 2 Q. B. 408; 60 L. J. Q. B. 722; and *Heseltine v. Simmons*, [1892] 2 Q. B. 547; 62 L. J. Q. B. 5; W. N. (1892) C. A. 137.

(4) *Form.*

See the Bills of Sale Act, 1882, s. 9 (*q*), *ante*, p. 304, and the form in the schedule to that Act, *ante*, p. 307.

It will be seen that prior to the 1882 Act no special form of words was requisite to constitute a bill of sale, but that by sect.

Bill of sale void, unless made in

(*p*) The Bills of Sale Acts are set out *ante*, pp. 292 *et seq.*

(*q*) By the Bills of Sale Act, 1890 (53 & 54 Vict. c. 53), s. 1, letters of hypothecation of imported goods are exempted from the operation of sect. 9 of the 1882 Act.

accordance
with form in
schedule to
1882 Act.

9 of that Act, "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." *Per* Brett, M. R., in *Davis v. Burton*, 11 Q. B. D. 537; 52 L. J. Q. B. 636: "It is clear to me that this Act of Parliament [Bills of Sale Act, 1882] is drawn as a benevolent Act towards borrowers and as a stringent Act for the holders of bills of sale. It seems to me that it is the intention of sect. 9, which refers to the model bill of sale given in the schedule, that a bill of sale should have, as near as may be, the simplicity of that model bill of sale, so that the borrower of money may easily see how far he is placing a burden upon himself; and also in order that a creditor of the borrower where a bill of sale has been registered may be able to see, when he comes to look at the bill of sale, how far he may trust the proposed borrower. The bill of sale is, therefore, to be registered in a sufficiently easy form for such creditor to come to a conclusion as to its meaning without being obliged to take advice. . . . The legislature, in order to carry out that view, has introduced sect. 9 into this Act of Parliament, in addition to other matters which have been introduced, as, for instance, by sect. 7. In order to carry out the simplicity of the bill of sale, and of the transaction—because, if the bill of sale is to be simple, the transaction also must be simple—sect. 9 provides that every bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void—that is, void as against all the world, including the grantor—unless made in accordance with the form given in the schedule to the Act. I do not think that this means that it shall be void unless made in every particular in the form given in the schedule; but I take it that the word 'form' is merely a word of reference to that given in the schedule, and that the meaning is that, unless the bill of sale is made in accordance with the model, it would differ from the form in the schedule. It was suggested on behalf of the claimant that everything which was not inconsistent with that form would be in accordance with it. But that is an argument which I am unable to accept; for the words 'in accordance with the form' must mean that the bill of sale is in form to be substantially like the one given in the schedule. It must not, by means of any contradiction or addition, be made substantially different from that form. A bill of sale may be so overlaid with additions as to make it unlike the form. The principle

Sufficient if
bill of sale is
substantially
like the
statutory
form.

aimed at by sect. 9 was that the recorded transaction should be as simple as the transaction in the model bill of sale, and that the bill of sale itself should also be as simple as the model bill of sale." Moreover, although the meaning of a bill of sale may be ambiguous, yet if, when its true construction is arrived at, it does not differ materially from the statutory form, it will not be held void by reason of its ambiguity. *Hastewood v. Consolidated Credit Co.*, 25 Q. B. D. 555; 60 L. J. Q. B. 12.

Where it is clear on the face of a bill of sale and without any evidence outside that document that the person signing it as attesting witness in two attestation clauses is one and the same person, although his name, address, and description are given in one clause, and his name only in the other, the bill of sale is not void under sect. 9 of the Bills of Sale Act, 1882, by reason of its not being in accordance with the statutory form. *Bird v. Davey*, [1891] 1 Q. B. 29; 60 L. J. Q. B. 8.

Variation of description in two attestation clauses does not avoid bill.

It being sufficient, as already indicated, if a bill of sale be substantially like the statutory form, it need not be drawn in the exact words of the schedule, so that, for example, the mere omission of the words "by way of security" from the operative part of a bill of sale is not material. *Per Brett, M. R.*, in *Roberts v. Roberts*, 13 Q. B. D. 794; 53 L. J. Q. B. 313. (The reader is advised to read this portion of Brett, M. R.'s judgment in that case.)

Exact words of statutory form need not be followed.

The bill of sale in the following case was held to be void on the ground (*inter alia*) of its not being in substantial accordance with the statutory form through its providing for the payment of capitalized interest which, although stated to be at the rate of 60% per cent., might, it was considered, amount to much more, if there were a seizure of the goods consequent on any violation of the covenants. *Davis v. Burton*, 11 Q. B. D. 537; 52 L. J. Q. B. 636; and see *Myers v. Elliot*, (C. A.) 16 Q. B. D. 526; 55 L. J. Q. B. 233. In the latter case Lopes, L. J., said that "neither capitalized interest nor bonus can be reserved in a bill of sale, if that document is not to be avoided under the Act." See also *Lumley v. Simmons*, 34 Ch. D. 698; 56 L. T. 134; and *Roe v. Mutual Loan Fund*, 19 Q. B. D. 347; 56 L. T. 631; and, as to capitalized interest, *Thorp v. Cregeen*, 55 L. J. Q. B. 80, a decision which was, however, questioned in *Myers v. Elliot*, *ante*.

Provision for payment of capitalized interest avoids bill.

With regard to interest, the following mode of payment is Statutory

form does not require payments of interest to be of equal amounts.

Equality of instalments not obligatory.

Bill not in accordance with statutory form where no rate of interest specified.

Bill void when date of payment is uncertain.

not essential in order to comply with the statutory form, viz.:— that the whole principal and interest must be ascertained once and for all, and the periodical sum fixed which will satisfy both principal and interest by equal sums, the relative proportion of principal and interest varying in each payment, the principal increasing as the interest diminishes. The payment is to be by equal instalments of the principal together with the interest due at the respective times of payment of the instalments of principal. *Goldstrom v. Tallerman*, 18 Q. B. D. 1; 55 L. T. 866. And see *Edwards v. Marston*, [1891] 1 Q. B. 225; 60 L. J. Q. B. 202 (where *Goldstrom v. Tallerman*, *ante*, is distinguished). It has, moreover, been decided that the liberty given by the statutory form to insert stipulated times of payment other than those suggested by the form excludes the necessity of the payments being by equal instalments, and that the provision in the statutory form for equality of the instalments is therefore not obligatory but subject to variation. *In re Cleaver, Ex parte Rawlings*, 18 Q. B. D. 489; 56 L. J. Q. B. 197.

In *Blankenstein v. Robertson*, 24 Q. B. D. 543; 59 L. J. Q. B. 315, a bill of sale purported to assign the chattels specified in the schedule as security for the payment of a loan of 50*l.* “and interest thereon at the rate of 17*l.* 10*s.* for three years,” the grantor covenanting to pay the grantee the principal together with the interest then due in thirty-six equal instalments of 1*l.* 17*s.* 6*d.*,” commencing from the date of the instrument. It was held, that the bill of sale was not in accordance with the statutory form as it did not specify any rate of interest as chargeable for the loan. And see in regard to assessment of interest, *Haslewood v. Consolidated Credit Co.*, 25 Q. B. D. 555; 60 L. J. Q. B. 12; and *In re Heseltine, Woodward v. Heseltine*, [1891] 1 Ch. 464; reversed by the House of Lords *sub nom. Simmons v. Woodward*, 61 L. J. Ch. 252; 66 L. T. 534.

The bill of sale in the undermentioned case was held to be void on the following grounds, viz.: (a) its giving a power to seize on default in payment on demand and not in accordance with the requirements of sect. 7 and the schedule of the 1882 Act at a time therein provided or stipulated for payment; and (b) because of the power of sale arising forthwith on the happening of any of the contingencies mentioned and not being limited to the expiration of five clear days from the day of seizure as required by sect. 13. *Hetherington v. Groome*, 13

Q. B. D. 789; 53 L. J. Q. B. 576. Bills of sale were held void on like grounds in the cases of *Melville v. Stringer*, 12 Q. B. D. 132; 53 L. J. Q. B. 482; *Sibley v. Higgs*, 15 Q. B. D. 619; 54 L. J. Q. B. 525; *Clemson v. Townsend*, 1 C. & E. 418; *Mackay v. Merritt*, 34 W. R. 433; and *Furnivall v. Hudson*, [1893] 1 Ch. 335; 62 L. J. Ch. 178; 68 L. T. 378. See also *Hughes v. Little*, 17 Q. B. D. 204; 18 Q. B. D. 32; 55 L. T. 477, where it was held that the fact of a payment being uncertain because of its depending upon a contingency, the happening of which is uncertain, avoids the bill of sale as not being in accordance with the statutory form. *Per* Lord Esher, M. R., "Manisty, J., in his judgment in the Divisional Court seems to distinguish this case from those other cases where payment was to be upon demand; but, with great deference to him, I think he has not observed this, that the bill of sale was held bad in those cases because payment was to be made upon demand, that is, upon a time wholly uncertain, and therefore, not in accordance with the form; that here, although the payment is not to be made upon demand, yet it is to be made upon a contingency which may or may not happen, and which makes the time of payment just as uncertain as it was in those cases in which it was expressed to be on demand. I think the principle applies here as there, the principle being that the bill of sale cannot be held to be in accordance with the form in the schedule if by any reason the day of payment is uncertain. In those cases it was uncertain because payment was to be on demand; here it is uncertain because it depends upon a contingency the happening of which is uncertain." And see on this point *In re Coton, Ex parte Payne*, 56 L. T. 571; *Davis v. Burton*, 11 Q. B. D. 537; 52 L. J. Q. B. 636; *Bianchi v. Offord*, 17 Q. B. D. 484; 55 L. J. Q. B. 486 (the judgment of Bowen, L. J., in which latter case is valuable).

The bill of sale in the following case was given to secure payment of 30*l.* by instalments with interest at 60*l.* per cent. per annum and contained covenants by the grantor (*inter alia*) to preserve and keep the assigned chattels whole, safe, and uninjured (reasonable wear and tear only excepted), and during the continuance of such security to replace such of them as should be worn out by other articles of equal value, so as thereby to maintain the original value of the chattels. The grantee was moreover empowered to test the condition of the assigned chattels, and, if necessary, require them to be repaired

Extent of expression "for the maintenance or defeasance of the security."

in the ordinary way, in certain events to seize and sell the chattels and retain out of the proceeds (*inter alia*) all costs, charges, and expenses incurred "in discharging any distress, execution, or incumbrance on the goods" and "in the carriage, removal, warehousing, valuing, or sale thereof." It was held, that the bill of sale was made substantially in accordance with the statutory form, the above-mentioned provisions being covered by the expression "or otherwise for the maintenance or defeasance of the security," and that accordingly the bill of sale was a good one. *The Consolidated Credit and Mortgage Corporation v. Gosney*, 16 Q. B. D. 24; 55 L. J. Q. B. 61.

Moreover, where, as in the following case, the bill of sale contained covenants by the grantor that he (a) would not remove the assigned chattels or any of them from the premises where they then were, without the grantees' written consent, (b) would not permit or suffer such chattels, or any part thereof, to be destroyed or injured or to deteriorate in a greater degree than they would deteriorate by reasonable use and wear thereof, (c) would, whenever any of such chattels were destroyed, injured, or deteriorated, forthwith replace, repair, and make good the same, (d) would pay all rents, rates, taxes, and interest on mortgages payable in respect of the premises where the assigned chattels then were or might be removed to with the grantees' consent, and (e) would, on demand in writing, produce and show to the grantees his last receipt or receipts for rent, rates, and taxes in respect of such premises; whilst, in case default should be made by the grantor in performance of any of his above covenants (and all of which covenants were thereby declared and agreed to be necessary for the maintenance of the security thereby created), the grantees were empowered immediately to seize and, after five days, to sell the mortgaged chattels, it was held (reversing the judgment of Bowen, L. J.), that, whilst the fact that the parties had agreed that such covenant was necessary for the maintenance of the security did not make it so, the covenant to replace and repair articles destroyed, injured, or deteriorated, was necessary for the maintenance of the security and that accordingly it did not purport to give a power, on default, to seize and take possession for a cause not being one of those enumerated in the 7th section of the Act; for which reason the bill of sale was not vitiated by such covenant. *Per* Sir James Hannen: "Both the grantor's above covenant not to remove the goods without the grantees' consent and the

covenant to on demand in writing produce and show to the grantees the grantor's last receipt for rent, rates, and taxes were necessary for the maintenance of the security." *Furber v. Cobb*, 18 Q. B. D. 494; 56 L. J. Q. B. 273; 56 L. T. 689; and see *Turner v. Culpan*, 58 L. T. 340; 36 W. R. 278; and *In re Paxton, Ex parte Pope*, 60 L. T. 428.

A provision empowering the grantee to take the goods at his valuation is not, however, a provision for the maintenance of the security, but goes far beyond any proper or legitimate maintenance and vitiates the bill of sale. *Lyon v. Morris*, 19 Q. B. D. 139; 56 L. J. Q. B. 378; 56 L. T. 915.

Again, the bill of sale in the following case provided that the grantor would insure and keep insured the chattels therein comprised against loss or damage by fire in a certain sum, and that, in default of his so doing, the grantee might insure the same, and that moneys expended for such purpose, together with interest thereon at the rate of 5*l.* per cent. per annum from the date of the same having been expended, should on demand be repaid by the grantor, and until such repayment should be a charge upon all the premises thereby mortgaged. It was held, that such provision did not contravene the statutory form. (*Hetherington v. Groome*, 13 Q. B. D. 789; 53 L. J. Q. B. 576, distinguished). *In re Barber, Ex parte Stanford*, 17 Q. B. D. 259; 55 L. J. Q. B. 339.

Moreover, where a bill of sale gives the grantee, in addition to a power to keep on foot the insurance, power to pay all rent, rates, taxes, charges, assessments, and outgoings which may become due and payable in respect of the premises in which the mortgaged chattels are, and it is provided that thereupon all such payments together with interest thereon at a specified rate shall be a charge upon such chattels, such provisions have been held (on the authority of *In re Barber, Ex parte Stanford, ante*) to be justified by the power given by the statutory form to insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security. *Goldstrom v. Tallerman*, 18 Q. B. D. 1; 55 L. T. 866; but see *The Real and Personal Advance Co. v. Clears*, 20 Q. B. D. 304; 57 L. J. Q. B. 164 (where *Bianchi v. Offord, ante*, followed, and *Goldstrom v. Tallerman* and *In re Barber, Ex parte Stanford, ante*, distinguished). See also *Topley v. Corshie*, 20 Q. B. D. 350; 57 L. J. Q. B. 271; *Macey v. Gilbert*, 57 L. J. Q. B. 461; as also the recent case of *Briggs v.*

Pike, (C. A.) 61 L. J. Q. B. 418 (where *The Real and Personal Advance Co. v. Clears*, ante, distinguished.) And as to maintenance of the security in connection with agreement to pay insurance, see *Hammond v. Hocking*, 12 Q. B. D. 291; and *Furber v. Abrey*, 1 C. & E. 186.

A clause in a bill of sale, empowering the grantee "to sell the goods by private treaty or public auction on or off the premises," has been held to be a clause "necessary for the maintenance of the security" within the meaning of the statutory form. *Bourne v. Wall*, 64 L. T. 530; 39 W. R. 510.

In the undermentioned case a bill of sale to secure the payment of a loan contained the following provisions:—first, that the grantor should pay the interest on mortgages in respect of premises where the assigned chattels then were or might be removed to; and second, that upon payment of the loan the bill of sale, and any documents signed in relation to the loan, should remain in the custody and be the property of the grantee. It was held, that the bill of sale was not in accordance with the statutory form, and consequently void by reason of each of these provisions; for the first was wide enough to include mortgages under which there was no power of distress by which the assigned chattels might be affected, and was so far not for the maintenance of the security; and the second interfered with the legal right of the grantor to the possession of the bill of sale and documents, and was not immaterial, and therefore altered the legal effect of the form. *Watson v. Strickland*, 19 Q. B. D. 391; 56 L. J. Q. B. 594.

To return to *In re Barber*, *Ex parte Stanford*, ante, by the bill of sale in that case the grantor "as beneficial owner" assigned certain chattels to the grantee as security for payment of certain moneys. It was held, that the insertion of the words "as beneficial owner" has the effect of introducing into the statutory form covenants not to be found in it, nor authorized as terms for the maintenance of the security, and at variance with the statute of 1882, and consequently that the bill of sale in question was void under the 9th section of that Act. (The reader is strongly advised to read the entire judgment of Bowen, L. J., in this case.)

A covenant in a bill of sale by the grantor for further assurance by himself, and any other person or persons claiming by or through him, is not in contravention of the statutory form, and does not therefore invalidate the bill of sale. *In re Cleaver*,

Ex parte Rawlings, 18 Q. B. D. 489; 56 L. J. Q. B. 197. *Per* Fry, L. J.: "It was contended that the covenant for further assurance at the cost of the mortgagor was in excess of the statutory form. But in our opinion such a covenant was one for the maintenance of the security, and consequently free from objection." And see *Rodocanachi v. Milburn*, 18 Q. B. D. 67; 56 L. T. 594.

In *Furber v. Cobb*, 18 Q. B. D. 494; 56 L. J. Q. B. 273, there was a declaration in the bill of sale of the trusts of the sale moneys enabling the grantees, who were co-partners as auctioneers, to pay themselves the costs, charges, and expenses of and attending the sale, including therein "their full charges and commission as auctioneers, as if they were selling on behalf of the grantor," coupled with the ordinary proviso at the end against the grantees' seizure or taking possession of the assigned chattels for any cause other than those specified in sect. 7 of the Bills of Sale Act, 1882. It was held that the bill of sale was vitiated by the right conferred on the grantees to reimburse themselves out of the sale moneys their full charges and commission as auctioneers, having regard to the same being a provision for securing to the grantees a larger advantage than they would have had if the statutory form had been followed, it not being a provision for the maintenance of the security, but a provision for obtaining for the grantees, in addition to that security, the trade profits as auctioneers on the sale.

The grantor in the following case agreed (*inter alia*) to perform the covenants and stipulations contained in the therein recited indenture, but such covenants and stipulations did not appear from the bill of sale itself, and it was held that the bill of sale was invalid, having regard to the necessity of a bill of sale being in accordance with the statutory form, and, in particular, to the impracticability of anyone in this case seeing what were the covenants and stipulations in question. *Lee v. Barnes*, 17 Q. B. D. 77.

Non-disclosure in bill of sale of covenants in recited indenture avoids bill.

A provision "that the power of sale conferred upon mortgagees by the Conveyancing and Law of Property Act, 1881, shall be exercised by them in every respect as if the 20th section of the said Act had not been enacted, and that the mortgagees shall stand possessed of the proceeds of any sale made by them, upon trust to retain thereof the said principal sum, or so much thereof as for the time being remains unpaid, and the interest then due, together with all costs, charges, payments, and expenses incurred,

Proviso excluding sect. 20 of Conveyancing Act, 1881, does not avoid bill.

made, or sustained by the mortgagees in or about entering upon the said premises, and in discharging any distress, execution, or other incumbrance on the said fixtures, chattels, or things, or any of them, and seizing, taking, retaining, and keeping possession thereof, and in or about the carriage, removal, warehousing, valuing, or sale (including the cost of inventories, catalogues, or other advertising) thereof, or any part thereof," together with the ordinary proviso against seizure or possession of the assigned chattels for any other cause than those specified in the 7th section of the 1882 Bills of Sale Act, was held by Lord Esher, M. R., Cotton, Lindley, Bowen, and Lopes, L. JJ. (Fry, L. J., dissenting), not to render the bill of sale void under sect. 9 of the 1882 Act as not being in accordance with the statutory form. *Ex parte Official Receiver, In re Morritt*, 18 Q. B. D. (C. A.) 222; 56 L. J. Q. B. 139. See also *Watkins v. Evans*, 18 Q. B. D. 386; 56 L. J. Q. B. 200; and *Calvert v. Thomas*, 19 Q. B. D. 204; 56 L. J. Q. B. 470; and as to provision for exercise of power of sale under the Conveyancing and Law of Property Act, 1881, see *Ex parte Bentley, In re Morritt*, 34 W. R. 579. Moreover, the power of sale, which according to the decision of the majority of the Court of Appeal in *Ex parte Official Receiver, In re Morritt*, ante, arises on the exercise of the power to seize, carries with it implied trusts of the sale moneys, and, therefore, express trusts thereof, which are reasonable and proper under the circumstances of the case, do not vitiate such bill of sale. *Lumley v. Simmons*, 56 L. J. Ch. 329.

Proviso that purchaser not bound to inquire as to default avoids bill.

A bill of sale, which has an addition in the shape of a provision to the effect that a purchaser need not take steps to satisfy himself that default has been made by the grantor, is not in accordance with the statutory form, and is consequently void. *Parsons v. Hargreaves*, 55 L. J. Q. B. 408 (see judgment of Lord Coleridge, L. C. J., in this case). This decision was followed by the Court of Appeal in the subsequent similar case of *Bluiberg v. Beckett*, 18 Q. B. D. 96; 56 L. J. Q. B. 35; 55 L. T. 876.

Proviso giving power to seize larger than statutory power avoids bill.

A bill of sale contained a proviso giving power to the grantees to seize the chattels granted by the instrument if the "mortgagors should take the benefit of any Bankruptcy Act." The Bankruptcy Act, 1883, enables a person not only to become a bankrupt but to effect a composition with his creditors. It was held, that the bill of sale was bad, as it conferred upon the grantees the power to seize on the grantors taking the benefit of

any Bankruptcy Act, which was a larger power than the statutory power to seize conferred by the Bills of Sale Act, 1882, which is limited to the event of a grantor becoming a bankrupt. *Gilroy v. Bowey*, 59 L. T. 223.

As already intimated, it is an essential feature of the statutory form that all the chattels assigned should be described in the schedule. Accordingly, a bill of sale given by way of security for the payment of money, which purported to assign certain chattels specifically described in the schedule thereto, together with all other chattels the property of the grantor then in or about certain premises, and also all chattels which might during the continuance of the security be in or about the same or any other premises of the grantor, has been held void *in toto* under the 1882 Act for non-compliance with the statutory form in that respect. *Thomas v. Kelly*, 13 App. Cas. 506; 58 L. J. Q. B. 75; and see *Hadden, Best and Co. v. Oppenheim*, 60 L. T. 962. Where the schedule comprises chattels real as well as personal chattels, the bill of sale is not made in accordance with the statutory form. *Cochrane v. Entwistle*, 25 Q. B. D. 116; 59 L. J. Q. B. 418.

Statutory form not followed where chattels not specifically described;

nor where schedule contains chattels real.

As already intimated (*r*), an untrue statement of the consideration is not a deviation from the statutory form, and therefore does not render the bill of sale wholly void under sect. 9 of the 1882 Act, but only in respect of the personal chattels comprised therein under sect. 8; and a collateral agreement that the bill of sale shall not be made available till certain other securities are exhausted is not a term for the "defeasance" of the security, and the non-insertion of such an agreement does not make the bill void under sect. 9 as not being in accordance with the statutory form. *Heseltine v. Simmons*, [1892] 2 Q. B. 547; (C. A.) W. N. (1892) 137.

Untrue statement of consideration not a deviation from statutory form;

nor non-insertion of stipulation as to exhausting other securities.

Improper conditions or covenants in a bill of sale are not cured by a provision (similar to that in the statutory form) that the mortgaged chattels shall not be liable to seizure, or to be taken possession of by the grantee, for any cause other than those expressed in sect. 7 of the 1882 Bills of Sale Act. *Ex parte Pearce, In re Williams*, confirmed on appeal, 25 Ch. D. 656; 53 L. J. Ch. 500.

Improper conditions cannot be cured by proviso incorporating sect. 7.

(*r*) Under "Statement of Consideration," *ante*, p. 319, and the cited cases under "Defeasance," *ante*, p. 325.

How far bill of sale not in accordance with statutory form void.

A bill of sale not in accordance with the statutory form is void to all intents and purposes, including therefore the covenant for payment therein contained. *Davies v. Rees*, 17 Q. B. D. 408; 55 L. J. Q. B. 363; and see *Thomas v. Kelly*, *ante*. But the fact of a stipulation in a promissory note identical in dates and figures with a bill of sale for which it is given as collateral security rendering the bill of sale void does not make the promissory note invalid. *The Monetary Advance Co. v. Cater*, 20 Q. B. D. 785; 57 L. J. Q. B. 463. Moreover, a deed comprising personal chattels, which is void as a bill of sale, may be valid as to other property comprised in it. *In re Burdett, Ex parte Byrne*, 20 Q. B. D. 310; 57 L. J. Q. B. 263, where *Davies v. Rees* was explained and distinguished.

"It is very difficult to find any certain path among the conflicting dicta of the Court of Appeal, but as far as I am able to understand those dicta two propositions have been laid down. In the first place it is laid down that if any provision is inserted in a bill of sale which substantially changes the position of the parties from that which it would have been if the bill of sale had been drawn strictly in accordance with the form in the schedule, that is sufficient to invalidate the bill of sale. Secondly, such a provision none the less invalidates a bill of sale if a clause is inserted at the end to the effect that if there be anything in the bill of sale contrary to the provision of the Act it shall have no effect, and the bill of sale shall be deemed to be rightly drawn. These two propositions have not been questioned by any of the judges of the Court of Appeal. It has also been further decided by all the judges, with the exception of Fry, L. J., that if a bill of sale contains a bare or naked covenant which possibly might give a right of action, but so far as the bill of sale is concerned does not and cannot alter the rights of the parties, that may be treated as superfluous, or, in other words, that where a provision is inserted in a bill of sale which, construed by the light of the Bills of Sale Act is excessive, and that provision is coupled with a right to seize, the bill of sale is invalid, but if it is not coupled with a power to seize, then it is to be rejected on the ground that *superflua non nocent*, and the bill of sale is valid. These are the distinct propositions which, as far as I am able to understand, have been hitherto laid down on the construction of this Act." *Per* Lord Coleridge, L. C. J., in *Barr v. Kingsford*, 56 L. T. 861.

(5) *Attending Execution.*

(a) *Description of Parties.*

See the Bills of Sale Act, 1854, s. 1, and the Bills of Sale Act, 1878, s. 10, sub-s. 2 (s).

The object of the 1854 Act was to give the creditor a true idea of the grantor's position in life, and therefore a misdescription or absence of a true description in regard to his occupation was substantial and invalidated the transaction. *Allen v. Thompson*, 1 H. & N. 15; 25 L. J. Ex. 249; and see *Corbett v. Rowe*, 25 W. R. 59. And where there is an error in the name of the grantor of a bill of sale the test is:—Is the mischief one that is calculated to deceive and has deceived creditors? *In re Wood, Ex parte McHattie*, 10 Ch. D. 398; 48 L. J. Bank. 26; and *Button v. O'Neill*, 4 C. P. D. 354; 48 L. J. C. P. 368. The description of the grantor's residence and occupation required to be filed by the 1854 Bills of Sale Act is that of such residence, &c. at the time of the making of the affidavit, and not that at the time of the giving of the bill of sale. *Button v. O'Neill*, ante, but see *In re Hewer, Ex parte Kahen*, 21 Ch. D. 871; 51 L. J. Ch. 904. And see as to grantor's description in a bill of sale under the 1854 Act, *Morewood v. South Yorkshire Rail. Co.*, 3 H. & N. 798; 28 L. J. Ex. 114; *Allen v. Thompson*, ante; *Beales v. Tennant*, 29 L. J. Q. B. 188; *Pickard v. Bretz*, 5 H. & N. 9; 29 L. J. Ex. 18; 1 L. T. 45; *Foulger v. Taylor*, 1 L. T. 57; *Sutton v. Bath*, 3 H. & N. 382; 27 L. J. Ex. 388; *Adams v. Graham*, 33 L. J. Q. B. 71; 9 L. T. 606; *Hewer v. Cox*, 30 L. J. Q. B. 73; 3 L. T. 508; *Gray v. Jones*, 14 C. B. N. S. 743; and *Larchin v. North Western Deposit Bank*, L. R. 10 Ex. 64; 44 L. J. Ex. 71. The omission of a part of the description of the grantor of a bill of sale, which was neither intended nor calculated to deceive, and did not in fact deceive, will not, if the description is correct, invalidate the bill of sale. *Throssell v. Marsh*, 53 L. T. 321.

The registration of a bill of sale in the name of the grantor by Name. which he is known and recognized at the time is sufficient and valid. *Central Bank v. Hawkins*, 62 L. T. 901. Where in a bill of sale, executed by a man and his wife, the grantor made use of the christian name of "Alfred," his real name being "George Henry Arthur" S., whilst his wife was described as

(s) The Bills of Sale Acts are set out ante, pp. 292 et seq.

"the wife of Alfred S.," it was held that the registration of the bill of sale was not thereby rendered invalid, and that neither the Bills of Sale Act of 1878 nor the amendment Act of 1882 contained any provision requiring the grantor to make use of his own christian name. *Downs v. Salmon*, 20 Q. B. D. 775; 57 L. J. Q. B. 454. In *Lee v. Turner*, 20 Q. B. D. 773; 59 L. T. 320, the grantor of a bill of sale was therein and in the affidavit filed upon registration described as "Kendrick Turner, Tutor," whereas, in fact, his name was Frederick Henry Turner, and he was a schoolmaster. It was held, that such misdescription rendered the registration of the bill of sale void.

Occupation.

One who up to and at the time of a bill of sale had never been actually engaged in any trade or occupation was held properly described therein (or in the affidavit filed therein) as a "gentleman." *Gray v. Jones*, 14 C. B. N. S. 743. The lessee and manager of a theatre is not sufficiently described as "esquire" within the meaning of sect. 1 of the 1854 Bills of Sale Act. *Ex parte Hooman, In re Vining*, L. R. 10 Eq. 63; 39 L. J. Bank. 4. See also *Cooper v. Davis*, 48 L. T. 831; 32 W. R. 329 (C. A.). The business, required by the 1878 Act to be stated in the affidavit, is that by which the grantor of the bill of sale ordinarily seeks to make his livelihood, in respect of which he contracts debts, and which is his substantial as distinguished from any ancillary employment which he may carry on in addition for amusement or otherwise. *Ex parte The National Mercantile Bank, In re Haynes*, (C. A.) 15 Ch. D. 42; 49 L. J. Bank. 62; 43 L. T. 36; *In re Moulson, Ex parte Knightley*, 51 L. J. Ch. 823. In *Sharp v. McHenry, Sharp v. Brown*, 38 Ch. D. 427; 57 L. J. Ch. 961, the grantor of a bill of sale made in 1879 was described as a "contractor and financial agent." He had actively carried on the business of a financial agent down to 1874, when he became involved in litigation arising out of that business, which absorbed the whole of his time to the exclusion of other business. It was held, that the grantor's occupation was correctly described within the Bills of Sale Act, 1878, s. 10, sub-s. 2. See the judgment of Kay, J., therein as to the meaning and purpose of that sub-section. In a bill of sale on the furniture of an hotel, the licence for which was taken out in the name of a third person, the grantor who carried on the business of the hotel was described as "a married woman." This was held to be a sufficient description. *Usher v. Martin*, 61 L. T. 778.

In *Greenham v. Child*, 24 Q. B. D. 29; 59 L. J. Q. B. 27, Residence. the grantor resided at X. and carried on business there and at Y. & Z., and a statement in the affidavit that he resided at X. was held to be a sufficient description of his residence.

In a bill of sale the grantee's residence was incorrectly referred to as "Baldock, in the County of Hereford"; the deed was registered and re-registered, and in the affidavit on the renewal of registration the grantee's residence was correctly stated as "Baldock, in the County of Hertford." It was held that, as such residence was not stated in the affidavit as it was stated in the bill of sale, the bill of sale was, under sect. 11 of the Bills of Sale Act, 1878, invalid as against the execution creditor. *Ex parte Webster, In re Morris*, 22 Ch. D. 136; 52 L. J. Ch. 375. In the undermentioned case under the 1882 Act, the grantee of a bill of sale was described as "The Discount Bank of London . . . of which said bank L. S. of the same place is the sole proprietor." Reference was made in other parts of the bill of sale to "the said bank" as the grantee, and the chattels were assigned "to the said bank and its assigns." It was held by the House of Lords, reversing the decision of the Court of Appeal, that there was no ambiguity in the description of the grantee who was sufficiently identified in the instrument as L. S. *In re Heseltine, Woodward v. Heseltine*, [1891] 1 Ch. 464; reversed by the House of Lords, *sub nom. Simmons v. Woodward*, 61 L. J. Ch. 252; W. N. (1892) 38.

Description of grantee.

(b) Attestation.

See the Bills of Sale Act, 1854, s. 1; the Bills of Sale Act, 1878, s. 10, sub-ss. 1 and 2; and the Bills of Sale Act, 1882, ss. 8 and 10 (t).

As to description of residence and occupation of attesting witness on filing under the 1854 Act, see *Attenborough v. Thompson*, 2 H. & N. 553; 27 L. J. Ex. 23; *Blackwell v. England*, 27 L. J. Q. B. 124; *Luton v. Sanoner*, 3 H. & N. 280; 27 L. J. Ex. 293; *Stadden v. Sergeant*, 1 F. & F. 322; *Nicholson v. Cooper*, 3 H. & N. 384; 27 L. J. Ex. 393; *Bath v. Sutton*, 1 F. & F. 152; 27 L. J. Ex. 388; *Dryden v. Hope*, 9 W. R. 18; 3 L. T. 280; and *Banbury v. White*, 2 H. & C. 300; 32 L. J. Ex. 258; as also *Shears v. Jacobs*, L. R. 1 C. P. 513; 35 L. J.

Description of residence and occupation of attesting witness, under 1854 Act.

(t) The Bills of Sale Acts are set out *ante*, pp. 292 *et seq.*

C. P. 241; *Deffell v. White*, L. R. 2 C. P. 144; 36 L. J. C. P. 25; and *Briggs v. Boss*, L. R. 3 Q. B. 268; 37 L. J. Q. B. 101.

Under 1878
Act bill to be
attested and
explained by
solicitor;

Under the 1878 Act, s. 10, the execution must be attested by a solicitor of the Supreme Court, and the attestation clause must state that the bill of sale has been explained to the grantor by such solicitor. Where, by the attestation clause, the bill of sale purports to have been explained to the grantor by the attesting solicitor, the provisions of the 1878 Act respecting attestation are fully complied with, and the validity of the document is not affected by the omission of the attesting solicitor to give the explanation which he says that he has given. But such solicitor would, as an officer of the Court, be liable to punishment for misbehaviour. *Ex parte The National Mercantile Bank, In re Haynes*, 15 Ch. D. 42; 40 L. J. Bank. 62.

but he cannot
attest bill in
his own
favour.

A solicitor cannot be the attesting witness of a bill of sale made in his favour, so as to satisfy the attestation requirements of the 1878 Bills of Sale Act. *Seal v. Claridge*, 7 Q. B. D. 516; 50 L. J. Q. B. 316. But the execution of a bill of sale under the 1878 Bills of Sale Act may be attested by the grantee's solicitor. *Penwarden v. Roberts*, 9 Q. B. D. 137; 51 L. J. Q. B. 312.

Under 1882
Act, attesta-
tion to be by
witness.

But now, under the 1882 Act, the execution of a bill of sale is to be "attested by one or more credible witness or witnesses not being a party or parties thereto," and the previous necessity of the attestation clause indicating that the bill of sale had been previously explained to the grantor by the attesting witness is now dispensed with. The Bills of Sale Act, 1882, repeals sect. 10 of the 1878 Act only so far as that section relates to bills of sale given by way of security for the payment of money. Accordingly, bills of sale granted by way of absolute transfer must still be attested in accordance with the attestation requirements of sect. 10. *Casson v. Churchley*, 53 L. J. Q. B. 335; 50 L. T. 568 (*Swift v. Pannell*, 24 Ch. D. 210, followed). Referring to the above partial repeal of sect. 10 of the 1878 Act, an attorney may now be appointed to execute a bill of sale by way of security for the grantor, and the grantee may be so appointed, although he cannot require any but one in accordance with the statutory form. *Furnivall v. Hudson*, [1893] 1 Ch. 335; 2 L. J. Ch. 178; 68 L. T. 378.

Description
of attesting
witness under
1878 and 1882
Acts.

With regard to the description of the attesting witness, "Walter Neve of Luton in the county of Bedford, solicitor," has been held to be a sufficient description of the attesting

witness within the 1878 Act. *Gardner v. Smart*, 1 C. & E. 14. And see as to address and description of attesting witness under the Bills of Sale Act, 1882, *In re Heseltine*, *Woodward v. Heseltine*, [1891] 1 Ch. 464; and *sub nom. Simmons v. Woodward*, 61 L. J. Ch. 252; W. N. (1892) 38. With regard to the attestation requirements of the 1882 Act (sect. 8), a defect in the required address and description of the attesting witness is not cured by the fact that such address and description appear in the registration affidavit. *Parsons v. Brand*, *Coulson v. Dickson*, 25 Q. B. D. 110; 59 L. J. Q. B. 189; and see *Blankenstein v. Robertson*, 24 Q. B. D. 543; 59 L. J. Q. B. 315; and *Bird v. Davey*, [1891] 1 Q. B. 29; 60 L. J. Q. B. 8. The attesting witness to a bill of sale may properly insert therein as his address the place where he is occupied during the day, though he does not sleep there. *In re Heseltine*, *Woodward v. Heseltine*, [1891] 1 Ch. 464; 60 L. J. Ch. 357.

(c) *Affidavit of Execution and Attestation.*

See the Bills of Sale Act, 1854, s. 1, and the Bills of Sale Act, 1878, s. 10, sub-s. 2 (*u*).

The affidavit of the attesting witness to the execution of a bill of sale, required by sect. 1 of the 1854 Bills of Sale Act to be filed with the bill, will be sufficient, if, on comparison with the bill, it appears to have been made by the attesting witness. *Routh v. Roubloft*, 28 L. J. Q. B. 240. Such affidavit (under the 1854 Act) must give either directly or by reference to the bill of sale, a description of the residence and occupation of the attesting witness at the time of his attesting the bill of sale. *Brodrick v. Scale*, L. R. 6 C. P. 98; 40 L. J. C. P. 130. But an insufficient description of an attesting witness to a bill of sale under the 1854 Act, contained in his affidavit registered therewith, may be cured by reference to a sufficient description of him in the attestation clause of the bill of sale. *Ex parte Mackenzie*, *In re Bent*, 42 L. J. Bank. 25; 28 L. T. 486. Where a bill of sale was attested by two witnesses and registered, and the registration affidavit only, however, contained a description of one of the attesting witnesses, it was held that there must be an affidavit describing both the witnesses, as well

Attestation
by and de-
scription of
witness.

(*u*) The Bills of Sale Acts are set out *ante*, pp. 292 *et seq.*

as verifying the copy of the bill of sale. *Pickard v. Marriage*, 1 Ex. D. 364; 45 L. J. Ex. 594. See also *Blaiberg v. Parke*, 10 Q. B. D. 90; 52 L. J. Q. B. 110; *Ex parte Young, In re Symonds*, 42 L. T. 744; and *Blount v. Harris*, 4 Q. B. D. 603; 48 L. J. Q. B. 159.

By the affidavit of attestation required by the 1878 Act (sect. 10, sub-sect. 2), it must be shown that the attesting witness was present at the execution of the bill of sale. Accordingly, such an affidavit which only verified the signature of the attesting witness was held to be insufficient and the registration of the bill of sale consequently invalid. *Sharp v. Birch*, 8 Q. B. D. 111; 51 L. J. Q. B. 64; *Ford v. Kettle*, 9 Q. B. D. 139; 51 L. J. Q. B. 558; and *In re Moulson, Ex parte Knightley*, 51 L. J. Ch. 823. It is not, however, necessary for the affidavit of attestation to state in so many words that the attesting witness did attest the bill of sale. It is sufficient if this can be inferred from such affidavit. *Yates v. Ashcroft*, 47 L. T. 337; and see *Cooper v. Zeffert*, (C. A.) 32 W. R. 402.

Execution by
and descrip-
tion of
grantor.

The affidavit of execution and attestation must state that the bill of sale has been duly executed and attested, and also give a description of the residence and occupation of the grantor. In *Ex parte Carter, In re Threappleton*, 12 Ch. D. 78; 41 L. T. 37, the attesting solicitor in his affidavit only stated that he saw the grantor sign and execute the bill of sale. It was held that such affidavit was sufficient, within the meaning of sect. 10, sub-sect. 2, of the Bills of Sale Act, 1878. See also *Ex parte Bolland, In re Roper*, 21 Ch. D. 543; 52 L. J. Ch. 113. An affidavit, which swore positively as to the time of the making of the bill of sale, but qualified the description of the residence and occupation of the person making it by stating them to be to the best of the belief of the deponent, was held sufficient to satisfy the requirements of the 1854 Act. *Roe v. Bradshaw*, L. R. 1 Ex. 106; 35 L. J. Ex. 71. In *Jones v. Harris*, L. R. 7 Q. B. 157; 41 L. J. Q. B. 6, it was held that a defect as to the description of the grantor's residence in the filed affidavit might be cured by reference to the bill of sale.

Registration.

See the Bills of Sale Act, 1854, sects. 1, 3, 5, and 6, the Bills of Sale Act, 1866, the Bills of Sale Act, 1878, sects. 8, 10, 11, 12, 13, 14, 15, and 16, and the Bills of Sale Act, 1882, sects. 8, 11, 15, and 16 (x). See also *Hatton v. English*, 7 El. & Bl. 94; 26 L. J. Q. B. 161; *Green v. Attenborough*, 3 Il. & C. 468; 34 L. J. Ex. 88; *Marples v. Hartley*, 3 El. & E. 610; 30 L. J. Q. B. 92; *Cookson v. Swire*, 9 App. Cas. 653; *Carrard v. Meek*, 43 L. T. 760; *Sharp v. McHenry*, *Sharp v. Brown*, 57 L. J. Ch. 961; *Ex parte Blaiberg*, *In re Toomer*, 23 Ch. D. 254; the important decision, on (*inter alia*) sect. 10 of the 1878 Act, of *Tuck v. Southern Counties Deposit Bank*, 42 Ch. D. 471; 58 L. J. Ch. 699; *Swift v. Pannell*, 24 Ch. D. 210; 48 L. T. 351; *Casson v. Churchley*, 53 L. J. Q. B. 335; 50 L. T. 568; and the recent case of *Davidson v. Carlton Bank*, [1893] 1 Q. B. 82; 41 W. R. 132 (C. A.).

The gist of the decision in *Tuck v. Southern Counties Deposit Bank*, *ante*, seems to be (1) that all bills of sale whether absolute or by way of security require registration, but (2) that an unregistered absolute assignment is not void except against certain persons, therefore (3) that a properly registered and otherwise valid bill of sale by way of mortgage is void, when given by the grantor of a prior unregistered absolute bill, because the grantor was not at the time of his giving the second bill the true owner of the chattels within sects. 5 and 6 of the Bills of Sale Act, 1882, and that in effect, therefore, the priority given by registration is of no avail, except as between mortgagees. It will not help a mortgagee as against an absolute unregistered transferee of chattels.

A transfer or assignment of a registered bill of sale need not, however, be registered (sect. 10, sub-sect. 3, 1878 Act); and see in connection with transfer, *Horne v. Hughes*, 6 Q. B. D. 676; 50 L. J. Q. B. 403; and *Ex parte Turquand*, *In re Parker*, 14 Q. B. D. 636; 54 L. J. Q. B. 242. An agreement to give a bill of sale does not require registration where the bill of sale has been given in pursuance of such an agreement, and the bill of sale is not void by reason of the non-registration of the agreement. *Ex parte Hawxwell*, *In re Hemingway*, 23 Ch. D.

All bills of sale require registration.

Registration not necessary of transfer of registered bill;

nor of agreement to give bill;

(x) The Bills of Sale Acts are set out *ante*, pp. 292 *et seq.*

nor when possession taken within time allowed for registration.

626; 52 L. J. Ch. 737. A bill of sale did not require registration when possession was taken by the assignee of the property comprised in the bill of sale within the twenty-one days allowed for registration by the Bills of Sale Act, 1854 (*Ex parte Northern Investment and Discount Co., In re Carlisle*, 27 L. T. 520; *Brignall v. Cohen*, 21 W. R. 25; and *Banbury v. White*, 2 H. & C. 300; 32 L. J. Ex. 258; 8 L. T. 508); but now, under the Bills of Sale Acts of 1878 and 1882, the period allowed for registration is seven days, so that, it seems, when possession is taken of the property within that time, the bill of sale is not invalidated by reason of non-registration.

Effect of registration within prescribed time when grantor bankrupt.

A bill of sale registered within the time prescribed by sect. 8 of the 1882 Act will sufficiently protect the goods comprised in it, notwithstanding the grantor's bankruptcy in the interval between execution and registration. *In re Hewer, Ex parte Kahen*, 21 Ch. D. 871; 51 L. J. Ch. 904.

Effect of omission to renew registration.

The effect of omitting to renew the registration of a bill of sale within five years after its execution, as required by sect. 11 of the Bills of Sale Act, 1878, is, since the passing of the Bills of Sale Act, 1882, to make such bill of sale wholly void, even as between grantor and grantee. *Fenton v. Blythe*, 25 Q. B. D. 417; 59 L. J. Q. B. 589. But a renewal of registration is not necessary by reason of a transfer or assignment of a bill of sale. 1878 Act, sect. 11. And see on this subject, *Karet v. Kosher Meat Supply Association, Limited*, 2 Q. B. D. 361; 46 L. J. Q. B. 548; *Ex parte Webster, In re Morris*, 22 Ch. D. 136; 52 L. J. Ch. 375; see also *Askew v. Lewis*, 10 Q. B. D. 477, in connection with the renewal of bills of sale under the 1854 and 1866 Acts.

Renewal not necessary on transfer.

Rectification of register.

With regard to a judge's power under sect. 14 of the 1878 Act to rectify an omission to register a bill of sale, or an omission or misstatement of any person's name, residence, or occupation, see *In re Dobbin's Settlement*, 56 L. J. Q. B. 295, and in particular *Crew v. Cummings*, 21 Q. B. D. 420; 57 L. J. Q. B. 641, and *In re Parsons, Ex parte Furber*, [1893] 2 Q. B. 122; 62 L. J. Q. B. 365; 68 L. T. 777. A mere clerical error or omission, which can mislead no one, will not prevent the copy bill of sale, required to be filed pursuant to sect. 10, sub-sect. 2, of the 1878 Act, from being a true copy within the meaning of that section, or vitiate the bill of sale. *In re Hewer, Ex parte Kahen*, 21 Ch. D. 871; 51 L. J. Ch. 904. The omission of the registrar of bills of sale to transmit (under the provisions of the 1878 and 1882 Acts) an abstract of a registered bill of sale to the

Omission of registrar to transmit abstract.

registrar of the County Court within the district in which the chattels enumerated in the bill are situated, does not avoid the bill. *Trinder v. Raynor*, 56 L. J. Q. B. 422.

Grantor's continued Possession.

See the Bills of Sale Act, 1854, ss. 1, 7, and the Bills of Sale Act, 1878, ss. 4, 8 (*y*).

In the case of an unregistered bill of sale, unless something has been done to change, in the outer world's view, that appearance of ownership with which the assignor is invested, such chattels remain in his "apparent possession" within the meaning of the 1854 Bills of Sale Act, and this notwithstanding that more than merely formal possession has been taken by, or given to, another person. *Ex parte Hooman, In re Vining*, L. R. 10 Eq. 63; 39 L. J. Bank. 4. Moreover, an advertisement of an intended sale of goods comprised in an unregistered bill of sale, even if posted on the grantor's premises where the goods are, must, in order to take the goods out of his possession or apparent possession, state that the sale is to be made under a bill of sale. *Ex parte Lewis, In re Henderson*, L. R. 6 Ch. 626; *Emanuel v. Bridger*, L. R. 9 Q. B. 286; 43 L. J. Q. B. 96.

Grantor's
apparent
possession
under 1854
Act.

The occupation, referred to in sect. 7 of the Bills of Sale Act, 1854, means a *de facto* occupation. *Robinson v. Briggs*, L. R. 6 Ex. 1; 40 L. J. Ex. 17. In that case the grantor of a bill of sale, which was not registered, was tenant of rooms where the goods comprised in it were placed, but he resided elsewhere. Having made default in paying the sum secured he gave the keys of the rooms to the grantee, who opened the rooms and put his name on some of the goods. None, however, were removed, and an execution at the suit of a judgment creditor against the debtor was afterwards levied on them. It was held, that the grantor did not "occupy" the rooms within the meaning of the 1854 Act, sect. 7, and that the goods were not to be

(*y*) The Bills of Sale Acts are set out *ante*, pp. 292 *et seq.* It will be observed that bills of sale to which the Bills of Sale Act, 1882, applies are void unless duly registered, as to which bills of sale the doctrine of apparent possession is accordingly inapplicable.

deemed in his "apparent possession," and that the bill was therefore valid as against the execution creditor.

Goods, formally seized by the sheriff under an execution, remain in the apparent possession of the debtor within the meaning of the 1854 Bills of Sale Act. *Ex parte Mutton, In re Cole*, 41 L. J. Bank. 57. But this decision was not followed in the subsequent case of *Ex parte Saffery, In re Brenner*, 16 Ch. D. 668, where it was held that, if the goods comprised in an unregistered bill of sale are, at the time of the filing of a bankruptcy petition against the grantor, in the actual visible possession of the sheriff under an execution, issued either by the grantee or by a third person, they are not, even though the grantee has himself taken no possession, in the "apparent possession" of the grantor, and that the Bills of Sale Act does not apply. "The distinction between formal and real possession is this, that if a bailiff is simply put in and remains in possession so as to prevent the removal of the goods, but allowing everything to go on just as it did before and permitting everything to be used by the debtor and his family, then the goods still remain in the apparent possession of the debtor. There must be something done which, in the eyes of everybody who sees the goods or who is concerned in the matter, plainly takes the goods out of the apparent possession of the debtor." *Per Mellish, L. J.*, in *Ex parte Jay, In re Bleckhorn*, L. R. 9 Ch. 697; 43 L. J. Bank. 122. But the grantee need not have exclusive possession to take the chattels out of the apparent possession of the grantor. *Burroughs v. Williams*, L. J. Notes of Cases (1878), 127.

In *Pickard v. Marriage*, 1 Ex. D. 364; 45 L. J. Ex. 594, a bill of sale was given to the grantee by way of security over certain furniture and goods of the grantor, of which one article was delivered to the grantee by way of possession of the whole. The whole of the chattels were left on the premises into which the grantee put the grantor to manage a milk business for him at a weekly salary with the use of the house and mortgaged chattels. The chattels were afterwards seized by an execution creditor, and it was held that the goods were in the grantor's apparent possession. *Per Bramwell, B.*: "The bill of sale not being properly registered, the plaintiff contended that the debtor was not in possession of the goods at the time of the execution. The debtor was, however, *bonâ fide* in possession, the goods comprised in the bill of sale being household furniture in rooms

which he occupied as servant to the plaintiff by using the rooms and having the benefit of the furniture, no doubt as part of his wages, but he was *de facto* in possession of the goods. It was said that that was not the possession meant by the Act. We are of opinion that it was. It is within the very words and mischief of the Act. Suppose, instead of receiving 1*l.* per week wages and having also the use of the furniture, the terms had been merely that he should receive 1*l.* 5*s.* per week, it is perfectly manifest that he would be within the Act, otherwise the consequence would be that the grantor of the bill of sale would continue in possession of the goods, paying rent to the grantee, and then the bill of sale need not be registered. This would be just the mischief which the Act was designed to prevent." The reader is advised to read this important case and the authorities cited therein. See also as to apparent possession within the 1854 Act, *Gough v. Eccard*, 2 H. & C. 1; 32 L. J. Ex. 210.

"Apparent possession" in sect. 8 of the 1878 Act means "apparently in the possession of," as distinguished from "actually in the possession of," and goods may at the same time be in the true and actual possession of one person and in the apparent possession of another. *Robinson v. Tucker*, 1 C. & E. 173; and see as to apparent possession, *Edwards v. Edwards*, 2 Ch. D. 291; 45 L. J. Ch. 391; *Furber v. Finlayson*, 34 L. T. 323; *Ex parte Fletcher*, *In re Henley*, 5 Ch. D. 809; 46 L. J. Bank. 93; and *Gibbons v. Hickson*, 55 L. J. Q. B. 119; 53 L. T. 910.

Apparent
possession
under 1878
Act.

Grantee's Seizure or taking Possession.

As to grantee's seizure or taking possession, see *Brighty v. Norton*, 32 L. J. Q. B. 38; 3 B. & S. 305; *Toms v. Wilson*, 32 L. J. Q. B. 382; 4 B. & S. 455; and *Ex parte Fletcher*, *In re Henley*, 5 Ch. D. 809; 46 L. J. Bank. 93.

Consolidation.

A bill of sale holder is not entitled to consolidate his bill of sale with a mortgage of land of the grantor as against an execution creditor. *Chesworth v. Hunt*, 5 C. P. D. 266; 49 L. J. C. P. 507.

Transfer or Assignment of Bill of Sale.

As already intimated, a transfer or assignment of a registered bill of sale need not be registered; nor is renewal of registration necessary by reason of a transfer or assignment of a bill of sale.

CHAPTER XXV.

BANKRUPTCY, ARRANGEMENTS WITH CREDITORS, AND VOLUNTARY OR FRAUDULENT DISPOSITIONS OF PROPERTY.

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I. BANKRUPTCY.

Available Acts of Bankruptcy.

UNDER the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, Available acts of bankruptcy. sub-s. 1, "a debtor commits an act of bankruptcy in each of the following cases:—

- "(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally." There must be a conveyance or assignment in the proper sense of the term. *In re Spackman, Ex parte Foley*, 24 Q. B. D. 728; 59 L. J. Q. B. 306; 62 L. T. 849; 7 M. B. R. 100, which is discussed and explained in *In re Hughes*,

Ex parte Hughes, [1893] 1 Q. B. 595; 62 L. J. Q. B. 358; 68 L. T. 629.

- “(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.” The fraudulent intention is essential. *In re Spackman, Ex parte Foley, ante.*
 - “(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt.
 - “(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.
- [Clause (e) is repealed by the Bankruptcy Act, 1890 (53 & 54 Vict. 71), and sect. 1 of that Act, *infra*, is substituted.]
- “(f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.
 - “(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained.” The judgment must be one on which execution could go immediately and without leave. *Ex parte Ide*, 17 Q. B. D. 755; 55 L. J. Q. B. 484. The term “final

judgment" has been discussed in *Ex parte Alexander*, [1892] 1 Q. B. 216; 61 L. J. Q. B. 377; *Ex parte Moore*, in *re Faithful*, 14 Q. B. D. 627; 54 L. J. Q. B. 190; 52 L. T. 376; *Ex parte Henderson*, 20 Q. B. D. 509; 57 L. J. Q. B. 258; 58 L. T. 835. See also *Salaman v. Warner*, [1891] 1 Q. B. 734; 60 L. J. Q. B. 624. "Creditor" in the above section means any person who is entitled for the time being to enforce a final judgment, as to which see sect. 1 of the Bankruptcy Act, 1890.

"(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." On the construction of this clause, see *Crook v. Morley*, [1891] A. C. 316; 24 Q. B. D. 320; 65 L. T. 389; 8 M. B. R. 227; and *In re Daintrey*, *Ex parte Holt*, [1893] 2 Q. B. 116.

By sect. 1 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), which is substituted for sub-sect. 1 (e) of sect. 4 of the Bankruptcy Act, 1883, "a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days. Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days."

Receiving Order.

By sect. 6, sub-sect. 1, of the Bankruptcy Act, 1883, "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

Conditions on which creditor may petition.

"(a) The debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds, and

- “(b) The debt is a liquidated sum, payable either immediately or at some certain future time, and
- “(c) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and
- “(d) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.”

Where proceedings stayed, Court may make order on another petition.

By sect. 7, sub-sect. 6, “Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.” By sub-sect. 7, “A creditor’s petition shall not, after presentment, be withdrawn without the leave of the Court.”

Debtor’s petition and order thereon.

By sect. 8, sub-sect. 1, “A debtor’s petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order.” By sub-sect. 2 “A debtor’s petition shall not, after presentment, be withdrawn without the leave of the Court.”

Effect of receiving order.

After proof of the petitioning creditor’s debt, the act of bankruptcy and service of the petition, a receiving order is made. As to the effect of a receiving order for the protection of the estate, by sect. 9, sub-sect. 1, it is enacted that “On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose.” By sub-sect. 2 “This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.”

Adjudication of bankruptcy.

After the receiving order is made, the creditors may resolve that the debtor be adjudged a bankrupt, and if they so resolve,

and also in certain other circumstances, the Court "shall" adjudge the debtor a bankrupt, and immediately the adjudication is made, the debtor's property vests in the trustee, or, if no trustee is appointed, in the official receiver acting as trustee. Vesting of property.
 Bankruptcy Act, 1883, ss. 20 and 54; *Turquand v. Board of Trade*, 11 App. Cas. 286; 55 L. J. Q. B. 417; 55 L. T. 30; *Ex parte Pinfold*, [1892] 1 Q. B. 73; 61 L. J. Q. B. 161; 65 L. T. 683; 8 M. B. R. 312; 40 W. R. 223. As to property acquired by the bankrupt after the bankruptcy and before his discharge, all transactions with reference to such property entered into by the bankrupt with persons dealing *bonâ fide* and for value, whether with or without knowledge of the bankruptcy, are, until the trustee intervenes, valid as against the trustee; (*Cohen v. Mitchell*, 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 7 M. B. R. 207); but *semble*, this proposition does not extend to real estate. *In re New Land Development Association and Gray*, [1892] 2 Ch. 138; 61 L. J. Ch. 323; 40 W. R. 295; 66 L. T. 404.

Stay of Proceedings.

By the Bankruptcy Act, 1883, s. 10, sub-s. 2, "The Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just." And in the case of small bankruptcies, by sect. 122, sub-sect. 5, "When the [administration] order is made, no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a county court, except with the leave of that county court, and on such terms as that Court may impose; and any county court or inferior court in which proceedings are pending against the debtor in respect of any such debt shall, on receiving notice of the order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt notified." As to motions and practice, see the Bankruptcy Rules, 1886, rr. 27—37,

Court may stay proceedings on proof of presentation of petition.

In case of small bankruptcies, county court, &c. may stay proceedings.

and as to service of the order staying proceedings and service of notices, see the Bankruptcy Act, 1883, ss. 11 and 142.

Power of Court does not apply to proceedings after discharge.

According to Williams on Bankruptcy, it seems that the power of the Court under sect. 10 to restrain actions does not apply to proceedings commenced after the discharge of the bankrupt, for, since the bankrupt in any such case can plead his discharge, he requires no protection. Under the Act of 1869 it was held that the Court would not restrain proceedings in an action to which the discharge of the debtor in bankruptcy would be no defence (*Ex parte Coker, In re Blake*, L. R. 10 Ch. 652; 44 L. J. Bank. 126; 24 W. R. 145), although in *Cobham v. Dalton*, L. R. 10 Ch. 655; 44 L. J. Ch. 702; 23 W. R. 865, it was held that, although the debt in question was one from which the order of discharge would not release the bankrupt, still, as it was a debt provable under the bankruptcy, he was, pending the bankruptcy proceedings, protected from attachment for disobedience to an order to pay money into Court. But see on this subject, *Mitchell v. Simpson*, 23 Q. B. D. 373; 25 Q. B. D. 183; 59 L. J. Q. B. 355; 63 L. T. 405; *In re Riley, Ex parte The Official Receiver*, 15 Q. B. D. 329; *In re Wray*, 36 Ch. D. 138; 56 L. J. Ch. 1106; 57 L. T. 605.

Liability of sheriff's officer for proceeding after notice.

In *In re Bryant*, 4 Ch. D. 98, a sheriff's officer and an auctioneer proceeded with the sale of the property of a trader seized under a *fi. fa.* after they had received notice by a letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the Court of Bankruptcy had made an order restraining further proceedings under the writ. It was held, that the sheriff's officer and the auctioneer had been guilty of contempt of Court, and that they must pay the costs of a motion to commit them. See as to restraining the sale by the sheriff of the bankrupt's property, *Ex parte Tidey*, 21 L. T. 685.

Discharge of Bankrupt.

Discharge of bankrupt.

As to discharge of bankrupt, see the Bankruptcy Act, 1890, sect. 8, sub-sect. 1 (*a*), and the Rules of 26th November, 1890, W. N. (1890) 513.

(*a*) Sect. 28 of the Bankruptcy Act, 1883, is repealed by the Bankruptcy Act, 1890, and sect. 8 of that Act substituted.

As to the effect of an order of discharge, by the Bankruptcy Act, 1883, sect. 30, sub-sect. 1, "An order of discharge shall not release the bankrupt from any debt on a recognizance nor from any debt with which the bankrupt may be chargeable at the suit of the Crown, or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence; and he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom. An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party." By sub-sect. 2, "An order of discharge shall release the bankrupt from all other debts provable in bankruptcy." By sub-sect. 3, "An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence." By sub-sect. 4, "An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him." And by the Bankruptcy Act, 1890, sect. 10, "An order of discharge shall not release the bankrupt from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent and under such conditions as the Court expressly orders in respect of such liability."

Effect of order of discharge.

Subject to any special conditions attached to his discharge (as to which see the Bankruptcy Act, 1890, sect. 8), the bankrupt is entitled to any property he may acquire after his discharge. The discharge is frequently suspended until a dividend of ten shillings in the pound has been paid. See *In re Hawkins*, [1892] 1 Q. B. 890; 61 L. J. Q. B. 458.

Bankrupt's right to property acquired after discharge.

Relation back of Trustee's Title and Commencement of Bankruptcy.

Relation back of trustee's title and commencement of bankruptcy.

By the Bankruptcy Act, 1883, s. 43, "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor." And see the Bankruptcy Act, 1890, s. 20, as to relation back in the case of a receiving order against a judgment debtor in pursuance of sect. 103 of the principal (1883) Act. See also *In re McHenry, Ex parte McDermott*, 21 Q. B. D. 580; (C. A.) 36 W. R. 725; *Sharp v. McHenry, Sharp v. Brown*, 57 L. J. Ch. 961; 55 L. T. 747; and *Barrow v. Ehlers, Seel & Co.*, 1 C. & E. 432.

Extent of the Bankrupt's Property divisible amongst Creditors.

Extent of bankrupt's property divisible amongst creditors.

By the Bankruptcy Act, 1883, s. 44, "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars:—

- "(1.) Property held by the bankrupt on trust for any other person;
 - "(2.) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole.
- "But it shall comprise the following particulars:—
- "(1.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and

- “(2.) The capacity to exercise, and to take proceedings for exercising, all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and
- “(3.) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.”

The reputed ownership of a bankrupt in goods is interrupted if the sheriff has lawfully taken possession of them. Thus, in the case of *Fletcher v. Manning*, 12 M. & W. 571; 1 C. & K. 350; 13 L. J. Ex. 150, where the goods, for the proceeds of which the action was brought, had been mortgaged by the bankrupt, and at the time of the act of bankruptcy were in the hands of the sheriff, having been previously seized by him under an execution, it was held that the goods, not being in the bankrupt's order and disposition at the time of the act of bankruptcy, did not pass to his assignees. Also, in *Ex parte Foss, In re Baldwin*, 2 De G. & J. 230; 27 L. J. Bank. 17; 4 Jur. N. S. 522, it was decided that property, which was seized by the sheriff before the bankruptcy, and in his possession down to the bankruptcy, was not in the order, disposition, and reputed ownership of the bankrupt. But goods are still in the reputed ownership of the bankrupt if the sheriff has wrongfully taken possession of them, or if the possession of the sheriff is merely formal. In *Barrow v. Bell*, 5 El. & Bl. 540; 25 L. J. Q. B. 2; 2 Jur. N. S. 159, it was held that goods, left in possession of a trader, at the time he became bankrupt, with the owner's consent, pass to the assignees, although before bankruptcy the sheriff, under a *fieri facias* against the bankrupt's goods, entered on the premises and stated that he took possession of the goods, but in fact left the bankrupt apparently in possession of them; for the sheriff was not justified in seizing the goods, and therefore his assertion that he took possession had no effect in law. In the undermentioned case the sheriff, on behalf of an execution

Effect of seizure by sheriff on reputed ownership.

creditor, seized goods on which there was a registered bill of sale. Two days after the seizure by the sheriff, the debtor filed his petition, and the trustee in the liquidation took possession of the goods before possession was either demanded or taken by the holder of the bill of sale. It was held, that the wrongful seizure by the sheriff did not prevent the goods from being in the debtor's order and disposition, with the consent of the true owner, when he filed the petition, and that they, therefore, passed to the trustee. Bacon, C. J., in his judgment, said: "It is clear that the sheriff took possession under the execution before the petition was presented, and that he continued in possession for some days after, but then, as he took possession on behalf of an execution creditor when there was a registered bill of sale, such possession was wrongful, and could not be held to disturb that of the debtor." *Ex parte Edey, In re Cuthbertson*, L. R. 19 Eq. 264; 44 L. J. Bank. 55; 31 L. T. 851.

Effect of Bankruptcy on Antecedent Transactions.

Restriction of rights of creditor under execution or attachment.

By the Bankruptcy Act, 1883, sect. 45, sub-sect. 1, "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

When execution or attachment regarded as complete.

By sub-sect. 2, "For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver." Where a sheriff has seized goods on behalf of an execution creditor, but is ordered before sale to withdraw in favour of a receiver in an action in the Chancery Division, the execution has not been "completed" within sect. 45, and the goods seized pass to the trustee in bankruptcy of the debtor. *Mackay v. Merritt*, 34 W. R. 433; and see *Ex parte Moore, In re Dickenson*, 37 W. R. 96 and 130; *In re Dickenson, Ex parte Charrington*, 22 Q. B. D.

193; 58 L. J. Q. B. 1; and also *Ex parte Brown, In re Hastings*, 61 L. J. Q. B. 654; 67 L. T. 234; 9 M. B. R. 234. But an order made against a debtor after land has actually been delivered by the sheriff, but before the return of the writ of elegit, does not oust the right of a judgment creditor, the "seizure" being "complete" within sect. 45, sub-sect. 2. *In re Hobson*, 33 Ch. D. 493; 55 L. J. Ch. 754; 55 L. T. 255; 34 W. R. 786.

As to sufficiency of notice of an act of bankruptcy, see *Lucas v. Dicker*, 6 Q. B. D. 84; 50 L. J. Q. B. 190; and *In re McGowan, Ex parte Ashton*, 64 L. T. 28; 39 W. R. 320. A sheriff, who after seizure receives notice in general terms that the execution debtor has committed an act of bankruptcy, may take reasonable time to inquire whether the statement is true before proceeding to sell, unless he is aware of circumstances which cause him to think that the notice is a mere pretence. *Ayshford v. Murray*, 23 L. T. 470.

Notice of act of bankruptcy.

It is the duty of a sheriff's officer, who receives notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted by the Court to restrain a sale in the country under an execution, to telegraph to the Court, or to the London agents of the sheriff, to ascertain whether an injunction has really been granted. This, however, is not the duty of the auctioneer who is conducting the sale; he is only bound to communicate with the sheriff's officer who has instructed him to sell. *Ex parte Langley, In re Bishop*, 13 Ch. D. 110; 49 L. J. Bank. 1; 41 L. T. 388; 38 W. R. 174. Where a sheriff's officer and an auctioneer proceeded with the sale of the property of a trader seized under a *fi. fa.* after they had received notice by letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the Court of Bankruptcy had made an order restraining further proceedings under the writ, it was held that the sheriff's officer and the auctioneer had been guilty of contempt of Court. *In re Bryant*, 4 Ch. D. 98; 35 L. T. 489; 25 W. R. 230.

Duty of sheriff's officer on receipt of notice of injunction.

Liability for proceeding after notice.

By sect. 11, sub-sect. 1 of the Bankruptcy Act, 1890 (*b*), "Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is

Duty of sheriff as to goods taken in execution on notice of receiving order.

(*b*) By this Act the corresponding provision (sect. 46, sub-sect. 1) of the Bankruptcy Act, 1883, is repealed.

served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge." It is the duty of the sheriff in possession of goods taken in execution, when required under this section, to deliver them to the official receiver, notwithstanding pending interpleader proceedings. *In re Harrison, Ex parte Essex (Sheriff)*, [1893] 2 Q. B. 111; 62 L. J. Q. B. 266; 68 L. T. 590; W. N. (1893) 68. Under the provisions of this section it is still the duty of the sheriff to proceed with the sale, unless the official receiver or trustee requests that the goods be delivered up. *Woolford's Estate v. Levy*, [1892] 1 Q. B. 772; 61 L. J. Q. B. 546; 66 L. T. 812; 40 W. R. 483. Lord Esher, M. R., in that case said, "I think that, if no request is made, his [the sheriff's] duty to sell remains unaltered and unaffected by the receiving order. He must proceed with the execution and sell the goods; but, when he has done so, the creditor is not to have the benefit, but the proceeds must be handed to the receiver or trustee less the expenses to which the sheriff is entitled."

Costs of
execution.

The costs of execution are limited to the date of the official receiver's notice, for any further costs of possession are no longer costs of execution. *In re Harrison, Ex parte Essex (Sheriff)*, [1893] 2 Q. B. 111; 62 L. J. Q. B. 266; 68 L. T. 590; W. N. (1893) 68. The "costs of execution" do not include the sheriff's poundage. *In re Ludford, Official Receiver v. Warwickshire (Sheriff)*, 13 Q. B. D. 415; 53 L. J. Q. B. 418. See, however, *Smith v. Darlow*, 26 Ch. D. 605; 53 L. J. Ch. 696. See also under the title "Interpleader" ("When Sheriff entitled to Costs" and "Appeal"), *post*, pp. 389, 395; as to costs of execution, *Ex parte Craycraft, In re Browning*, 8 Ch. D. 596; 47 L. J. Bank. 96; as to right to possession money where the receiving order is made before sale, and delay of sale, *In re Essex (Sheriff), Ex parte Levy*, 63 L. T. 291; 38 W. R. 784; 65 L. T. 466; 7 M. B. R. 125; and under the title "Sheriffs' Fees, &c.," *post*, p. 505. Costs of the sheriff for harvesting corn taken in execution, but not sold before notice of the receiving order, are not "costs of execution." *In re Woodham, Ex parte Couder*, 20 Q. B. D. 40; 57 L. J. Q. B. 46.

In the undermentioned case a judgment debtor, against whom there was an execution in the sheriff's hands, had committed an act of bankruptcy of which the sheriff had notice and on which the judgment debtor was subsequently adjudicated bankrupt. The sheriff, notwithstanding such notice, sold the debtor's goods under the execution, deducted his poundage fees and expenses of the sale, and paid the balance to the assignees. It was held that the sheriff was not entitled to these deductions. *In re Priestly*, 23 L. R. Ir. 536.

With due regard to the substitution of sect. 11, sub-sect. 1 of the Bankruptcy Act, 1890, for sect. 46, sub-sect. 1 of the Bankruptcy Act, 1883, the following rule is apparently still applicable, viz.:—"In any case in which, pursuant to sect. 46, sub-sect. 1 of the Act [Bankruptcy Act, 1883], a sheriff is required to deliver goods to an official receiver or trustee, such sheriff shall, without delay, bring in his bill of costs for taxation, which shall be taxed by the taxing officer of the Court having jurisdiction in the bankruptcy; and unless such bill of costs is brought in for taxation within one month from the date when the sheriff makes such delivery, the official receiver or trustee may decline to pay the same." Bankruptcy Rules, 1886, Rule 118.

By the Bankruptcy Act, 1890, s. 11, sub-s. 2 (c), "Where under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor." Where the sheriff sells under an execution for more than 20*l.* and within fourteen days afterwards receives notice of a bankruptcy petition, the sale is not therefore rendered absolutely void, but the execution creditor is consequently deprived of the fruits of the sale, and they are transferred to the trustee

Taxation of
sheriff's costs.

Duty of
sheriff as to
goods taken
in execution
when judg-
ment debt
exceeds 50*l.*

(c) By this Act the corresponding provision (sect. 46, sub-sect. 2) of the Bankruptcy Act, 1883, is repealed.

in the bankruptcy for the benefit of the general body of the creditors. Where, therefore, a sheriff is in possession under several writs, some for more and some for less than 20*l.*, and proceeds to sell, the writs are payable in order of priority so long as there are funds to pay; but if he receives notice of a bankruptcy petition within fourteen days after the sale, only those writs are entitled to be paid which are for less than 20*l.* and which would have been paid had not bankruptcy supervened. *In re Pearce, Ex parte Crossthwaite*, 14 Q. B. D. 966; 54 L. J. Q. B. 316; and see *Heathcote v. Lislesey*, 19 Q. B. D. 285; 56 L. J. Q. B. 645.

The following authorities in relation to the corresponding section (87) of the Bankruptcy Act, 1869, indicate the meaning of an execution in respect of a judgment for a sum exceeding 20*l.* (*d*). In *Ex parte Liverpool Loan Co., In re Bullen*, L. R. 7 Ch. 732; 42 L. J. Bank. 14; 27 L. T. 669, judgment having been entered up against a trader for 48*l.* 19*s.* 0*d.*, and the sheriff having levied and sold goods of the debtor to the amount of 50*l.* 11*s.* 0*d.* (being the amount of the judgment with 1*l.* 12*s.* 0*d.* for the costs of the execution), it was held (affirming the decision of the chief judge) that the goods had "been taken in execution in respect of a judgment for a sum exceeding 50*l.* and sold" within the meaning of the Bankruptcy Act, 1869, s. 87, and that the proceeds must therefore be paid to the trustee in bankruptcy, and not to the execution creditor. This decision was followed in *Howes v. Young, Howes v. Stone*, 1 Ex. D. 146; 45 L. J. Ex. 499; 34 L. T. 739. And where, although the seizure was under an execution for an amount less than 50*l.*, the amount for which the execution was ultimately levied exceeded 50*l.*, owing to expenses including possession money incurred by the sheriff, the execution was held to be "an execution in respect of a judgment for a sum exceeding 50*l.*," and the trustee was held entitled to the proceeds of sale. *In re Fenton, Ex parte Lythgow*, 10 Ch. D. 169; 48 L. J. Bank. 64; 38 L. T. 886. But a creditor, who had sued a trader for a debt exceeding 50*l.*, was entitled to abandon part of his claim, and to sign judgment for a sum less than 50*l.*, so as to avoid the operation of the 87th section. *Ex parte Reya, In re Salinger*, 6 Ch. D. 332; 46 L. J. Bank. 122; 37 L. T. 17. Moreover, a creditor who had sued a trader for a debt, and who had signed

(*d*) 50*l.*, the corresponding limit under the 1869 Act.

judgment for upwards of 50*l.*, might, by issuing execution for less than 50*l.*, avoid the operation of that section. *In re Hinks, Ex parte Berthier*, 7 Ch. D. 882; 47 L. J. Bank. 64; 26 W. R. 576. The fourteen days above referred to run from the date of the sale, and not from that of the sheriff's receipt of the proceeds. *In re Cripps, Ross & Co., Ex parte Ross*, 21 Q. B. D. 472; 58 L. J. Q. B. 19; and see *Jones v. Parsell*, 11 Q. B. D. 430; 52 L. J. Q. B. 672; 49 L. T. 197, which, though a decision under the 1869 Bankruptcy Act, is presumably still applicable.

By the case of *Curtis v. Wainbrook Iron Co.*, 1 C. & E. 351, it was decided that the notice to be served on a sheriff of a bankruptcy petition having been presented against or by the debtor, under sect. 46, sub-sect. 2 of the Bankruptcy Act, 1883, need not necessarily be in writing; but it is provided by Rule 13 of the Bankruptcy Rules, 1886, that "All notices required by the Bankruptcy Act and Rules shall be in writing, unless the Rules otherwise provide, or the Court shall in any case otherwise order," and by Rule 92, that "Where notice of an order or other proceeding in Court may be served by post, it shall be sent by registered letter." The notice of a bankruptcy petition must be served on the sheriff or his recognized agent (such as the under-sheriff) for the purpose of receiving such notices; it is not sufficient to serve it upon an ordinary bailiff or man in possession. *Ex parte Warren, In re Holland*, 15 Q. B. D. 48; 54 L. J. Q. B. 320; and see *Bellyse v. McGinn*, [1891] 2 Q. B. 227; 65 L. T. 318, where *Ex parte Warren, In re Holland*, is followed.

A sheriff who has remained in possession for an unreasonable period at the instance of the execution creditor, and without the debtor's consent, was held not to be entitled under the corresponding section (46) of the Bankruptcy Act, 1883, to charge against the debtor the costs of retaining such possession beyond what was a reasonable time. *In re Finch, Ex parte Esser (Sheriff)*, 65 L. T. 466; 40 W. R. 175; 8 M. B. R. 284.

By the Bankruptcy Rules, 1886, r. 119 (*c*), "If the official receiver or trustee shall, in writing, require any costs which a sheriff has deducted under sect. 46, sub-sect. 2, of the Act [Bankruptcy Act, 1883] to be taxed, the sheriff shall, within seven days from the date of the request, bring in such costs for

Notice to
sheriff of
bankruptcy
petition, &c.

Sheriff's costs
of possession.

Taxation of
sheriff's costs
after deduc-
tion.

(*c*) This rule is, it is conceived, still applicable, subject only to the alteration effected by the Bankruptcy Act, 1890, s. 11.

taxation, which shall be taxed by the taxing officer of the court having jurisdiction in the bankruptcy; and any amount disallowed on such taxation shall forthwith be paid over by the sheriff to the official receiver or trustee, as the case may require."

Liability of sheriff for paying after notice of bankruptcy petition.

If, after he has received notice of a bankruptcy petition, the sheriff pays the proceeds of a sale to the execution creditor, it seems he will be liable to be sued by the trustee in an action for money had and received (*Notley v. Buck*, 8 B. & C. 160); but the sheriff will be entitled to bring an action against the execution creditor to recover the money so paid. In the under-mentioned case, a creditor issued execution for a debt above 50*l.* and, after sale by the sheriff, issued another execution against the same debtor for another debt above 50*l.* The sheriff, having had no notice within fourteen days from the sale of any bankruptcy petition against the debtor, paid the money produced by the second sale to the execution creditor, but afterwards the debtor was adjudicated a bankrupt upon the act of bankruptcy committed by the seizure and sale under the first execution. It was held, that, though it was not proved that the creditor had, when the sale took place under the second execution, any actual knowledge that the sale had been made under the first, he must be deemed to have had notice of the proceedings under his own execution, and must therefore refund the money produced under the second execution. *Ex parte Dawes, In re Husband*, L. R. 19 Eq. 438; 44 L. J. Bank. 62. The sheriff, on the other hand, will be liable to an action for damages by the execution creditor, if he has improperly paid over the money to the trustee. *Ex parte Harper, In re Bremner*, L. R. 10 Ch. 379.

Title of purchaser of debtor's goods.

By the Bankruptcy Act, 1883, sect. 46, sub-sect. 3, "An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy."

Sale to be by public auction if execution for more than 20*l.*

By the Bankruptcy Act, 1883, sect. 145, "The sale under an execution for a sum exceeding twenty pounds (including legal incidental expenses) must, unless the Court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and must be publicly advertised by the sheriff on and during three days next preceding the day of sale." See on this subject, *Hunt v. Fensham*,

12 Q. B. D. 162, and under the title "Writ of *Fieri Facias*," *ante*, p. 84.

By the Bankruptcy Act, 1890, sect. 12, "Where any goods of a debtor are taken in execution, and the sheriff has notice of another execution or other executions, the Court shall not consider an application for leave to sell privately until the notice directed by rules of Court has been given to the other execution creditor or creditors, who may appear before the Court and be heard upon the application." By the Rules of the Supreme Court under sect. 12 of the Bankruptcy Act, 1890 (Sales under Executions), Order XLIII., "Every application under sect. 145 of the Bankruptcy Act, 1883, and sect. 12 of the Bankruptcy Act, 1890, for an order that a sale under an execution may be made otherwise than by public auction shall be made by summons at chambers. Upon service of a copy of the summons on the sheriff he shall forward to the applicant a list (hereinafter called the sheriff's list) of the names and addresses of every person at whose instance any other writ of execution against the goods of the debtor has been lodged with him (rule 8). The summons shall contain a short statement of the grounds of the application (rule 9). Notice of the application shall be given by serving a copy of the summons four clear days before the day on which the summons is returnable:—(a) If the applicant is an execution creditor, upon the sheriff and upon every person named in the sheriff's list; (b) if the applicant is the execution debtor, upon the execution creditor at whose instance the execution has been levied under which the sale is intended to be made, the sheriff, and every other person named in the sheriff's list (rule 10). On the hearing of the application the applicant shall produce to the Court or judge the sheriff's list (rule 11). The sheriff and every other person on whom the summons has been served may attend the hearing of the application and be heard in opposition to or in support of the application (rule 12). The Court or a judge may, at the hearing of any summons under these rules, direct that all or any part of the costs may be borne by any of the persons attending, or otherwise as may be just (rule 13). In these rules, 'sheriff' includes any officer charged with the execution of any writ of execution (rule 14)."

Application
for order for
private sale.

Small Bankruptcies.

As to small bankruptcies, that is, where the assets are expected to be under 300*l.*, see the Bankruptcy Act, 1883, s. 121.

Supplemental Provisions.

Certain provisions to bind Crown.

By the Bankruptcy Act, 1883, s. 150, "Save as herein provided, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown."

Administration in bankruptcy of person dying insolvent.

As to administration in bankruptcy of persons dying insolvent, see the Bankruptcy Act, 1883, s. 125 (subject to the partial repeal thereof by the Bankruptcy Act, 1890), and also the Bankruptcy Act, 1890, s. 21.

Evidence and computation of time.

As to evidence, see the Bankruptcy Act, 1883, ss. 132—140, and as to computation of time, see sect. 141, sub-sect. 1.

Definition of word "sheriff."

By sect. 168, the word "sheriff" in the Bankruptcy Act, 1883, includes any officer charged with the execution of a writ or other process. But a man who seizes, keeps possession of, and sells the goods of a judgment debtor by a direction of the sheriff is not "an officer charged with the execution of a writ or other process," and therefore is not a "sheriff" within the meaning of sect. 168. Officers of the inferior courts charged with analogous duties are included. *Ex parte Warren, In re Holland*, 15 Q. B. D. 48; 54 L. J. Q. B. 320.

II. ARRANGEMENTS WITH CREDITORS.

Statutory Arrangements.

As to composition or scheme of arrangement with creditors under the Bankruptcy Acts, see the Bankruptcy Act, 1890, s. 3 (*f*), the Bankruptcy Act, 1883, ss. 19 and 23 (as qualified

(*f*) Substituted for the corresponding section (18) of the Bankruptcy Act, 1883.

by the Bankruptcy Act, 1890, ss. 6 and 29), the Debtors Act, 1869, s. 15, the Bankruptcy Rules, 1886, rr. 267, 269, and 336, and the Bankruptcy Rules, 1890, rr. 18—38. See also *In re Burr*, *Ex parte Board of Trade*, [1892] 2 Q. B. 467; 61 L. J. Bank. 591; 66 L. T. 553; 9 M. B. R. 133.

Private Arrangements.

Under the present bankruptcy law, private deeds of arrangement may be made between a debtor and his creditors, but such deeds bind those creditors only who assent to them; it is not necessary that such assent should appear by the creditor actually signing the deed, *e. g.*, acting upon or accepting a benefit under the deed would be sufficient evidence of assent. See this subject discussed in Robson on Bankruptcy, 7th ed., p. 770.

Private deeds of arrangement only bind assenting creditors.

A voluntary assignment to trustees for the benefit of creditors is a revocable mandate by the debtor (*In re Ashby*, *Ex parte Wreford*, [1892] 1 Q. B. 872; 66 L. T. 353; 40 W. R. 430; 9 M. B. R. 77); but, it seems, it is only revocable as against creditors who are neither parties nor privy to the deed. *Acton v. Woodgate*, 2 Myl. & K. 493.

How far revocable by debtor.

If a debtor makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors he thereupon commits an act of bankruptcy, and it will be observed that the Bankruptcy Act, 1883, sect. 6, sub-sect. 1 (c) enacts that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition. But where a creditor has assented to, acquiesced in, or submitted to a deed of assignment for the benefit of creditors, he cannot afterwards rely on the execution of the deed as an act of bankruptcy. *Ex parte Michael*, 8 M. B. R. 305. An assignment is rendered void upon adjudication, and the property of the debtor thereupon vests in the trustee in bankruptcy.

Assignment of property for benefit of creditors an act of bankruptcy.

By sect. 4, sub-sect. 1 of the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), "This Act shall apply to every deed of arrangement, as defined in this section, made after the commencement of this Act." By sub-sect. 2, "A deed of arrangement to which this Act applies shall include any of the following

Deeds of arrangement under 50 & 51 Vict. c. 57.

instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—

- (a) An assignment of property;
- (b) A deed of or agreement for a composition.

And in cases where creditors of a debtor obtain any control over his property or business:—

- (c) A deed of inspectorship entered into for the purpose of carrying on or winding up a business;
- (d) A letter of licence authorising the debtor or any other person to manage, carry on, realise, or dispose of a business, with a view to the payments of debts; and
- (e) Any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise, or dispose of the debtor's business, with a view to the payment of his debts."

Unregistered
deeds of
assignment
to be void.

By sect. 5, "From and after the commencement of this Act a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England or Ireland respectively, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England or Ireland respectively, if posted within one week after the execution thereof, and unless the same shall bear such ordinary and *ad valorem* stamp as is under this Act provided."

Creditors may
sign deed
after regis-
tration.

Creditors may append their signatures to the deed after registration. *Ex parte Milne*, 22 Q. B. D. 685; 58 L. J. Q. B. 333; 57 W. R. 499; 5 T. L. R. 423. In that case the deed of arrangement was executed on the same day by the debtor, the trustee, and one creditor, and duly registered in compliance with the Act. Subsequently to such registration six other creditors signed and affixed their seals. It was held that the execution of the deed by creditors after registration did not amount to an alteration of the deed so as to avoid it or vitiate the registration of it; and that the provisions of the Act were sufficiently complied with by the registration of the deed as it existed at the time of such registration.

Mode of regis-
tration, &c.

The other sections of the Deeds of Arrangement Act, 1887, provide for the mode and form of registration, the registrar, the

office for registration, and other incidental matters. And see as to registration of deeds, transmission of copies to the County Courts, and searches and extracts, the Deeds of Arrangement Act Rules, 1888, W. N. (1888) p. 333, and in connection with the Deeds of Arrangement Act, 1887, *In re Batten, Ex parte Milne*, 22 Q. B. D. 685; 58 L. J. Q. B. 333. See also the Land Charges Registration and Searches Act, 1888, and as to deeds of arrangement, the Deeds of Arrangement Rules, 1890, W. N. (1890) p. 533.

III. VOLUNTARY OR FRAUDULENT DISPOSITIONS OF PROPERTY.

By 13 Eliz. c. 5, conveyances of lands, tenements, hereditaments, goods and chattels, made with a view to defrauding creditors, are void as against such creditors, subject to a proviso for conveyances made *bonâ fide* and on good consideration.

Fraudulent conveyances under 13 Eliz. c. 5, void.

A settlement, even for valuable consideration, made with the intention of defrauding creditors, is void under this statute. The mere fact, however, of a settlement being voluntary is not sufficient to render it void against creditors; but if the settlor was at the time of making the settlement—not necessarily insolvent—but so largely indebted as to induce the Court to believe that the intention of the settlement was to defraud his creditors, and some of his debts are still unpaid, the settlement may be set aside. *Holmes v. Penney*, 3 Kay & J. 90. In order to make void a deed as fraudulent against creditors, it is not necessary to prove that the party was insolvent at the time, if it appear that the intention was to delay creditors. *Richardson v. Smallwood*, Jac. 552. “It is not necessary to show, from anything actually said or done by the party, that he had the express design by the deed to defeat creditors; but if he includes in it property to such an amount that, having regard to the state of his property, and to the amount of his liabilities, its effect might probably be to delay or defeat creditors, if the Court is satisfied of that, the deed is within the meaning of the statute.” *Per Kindersley, V.-C.*, in *Jenkyn v. Vaughan*, 3 Drew. 424; see also *Thompson v. Webster*, 4 Drew. 632; and *Freeman v. Pope*, L. R. 5 Ch. 538; but see the judgment of Lord Esher, M.R., in *Ex parte Mercer, In re Wise*, 17 Q. B. D. 298.

Settlements, if intended to defraud creditors, void.

Voluntary settlement, if settlor about to engage in hazardous business, may be set aside.

In order to set aside a voluntary settlement as being void against creditors, it is not necessary to show that the settlor contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency, as *e.g.* if he were about to engage in business of a hazardous or speculative character, or if he was incurring heavy liabilities. *Mackay v. Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, *In re Butterworth*, 19 Ch. D. 588; and *Crossley v. Elworthy*, L. R. 12 Eq. 158.

Subsequent creditors participate in assets if deed set aside;

Where a deed is set aside as fraudulent against creditors the property becomes assets and is applicable to the payment of debts generally, and all the creditors come in at whatever times their debts may have arisen. *Richardson v. Smallwood*, Jac. 552.

and they may bring action to set aside settlement.

A voluntary settlement, whereby the settlor takes the bulk of his property out of the reach of his creditors shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements, under which the settlor was to engage in the business, would take effect. *Mackay v. Douglas*, L. R. 14 Ch. 106.

Valuable consideration may be proved.

A deed of settlement which in form appears to be voluntary may be proved by extrinsic evidence to have been made for valuable consideration, and thus be good against creditors. *Pott v. Todhunter*, 2 Coll. C. R. 76. An obligation, which is voluntary as regards the person in whose favour it was originally created, ceases to be voluntary when it passes into the hands of other persons who have given valuable consideration for it. *George v. Milbanke*, 9 Ves. Jun. 193; *Payne v. Mortimer*, 1 Giff. 118.

Duty of sheriff under 13 Eliz. c. 5.

With regard to the sheriff's duty under 13 Eliz. c. 5, it has been decided by the case of *Imray v. Magnay*, 11 M. & W. 267; 12 L. J. Ex. 188; 7 Jur. 240 (which was followed by *Christopherson v. Burton*, 3 Ex. 160; 18 L. J. Ex. 60), that the sheriff is obliged, under a writ founded on a *bonâ fide* debt, to seize, or seize and sell, goods which have been fraudulently conveyed or assigned; and that if he neglect to do so, having notice of the fraud at the time that he ought to have executed the writ, or if he could then have discovered it by reasonable inquiry, he is responsible for neglecting to seize and sell them, and an action lies against him.

As to fraudulent transactions under 13 Eliz. c. 5, see further *Twyne's Case*, Sm. L. C. Vol. I. pp. 1, *et seq.*, and the recent case of *In re Pennington, Ex parte Cooper*, 59 L. T. 774, affirmed by the Court of Appeal, W. N. (1888) 205; 5 T. L. R. 29.

As to the bankruptcy provisions in relation to an act of bankruptcy being committed by a debtor who has made a fraudulent conveyance, &c. of property, or a fraudulent preference, see the Bankruptcy Act, 1883, sect. 4, sub-sect. 1, (b) and (c).

Fraudulent conveyance or preference an act of bankruptcy.

By sect. 47, sub-sect. 1, "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." By sub-sect. 2, "Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy." By sub-sect. 3, "'Settlement' shall for the purposes of this section include any conveyance or transfer of property." See *Ex parte Todd, In re Ashcroft*, 19 Q. B. D. 186; 56 L. J. Q. B. 431; 35 W. R. 676.

Avoidance of voluntary settlements under Bankruptcy Act, 1883.

By sect. 48, sub-sect. 1, "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a

Avoidance of preferences in certain cases.

preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy." By sub-sect. 2, "This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt." To bring a transfer of personal property within the above section, it must be apparent from the nature and circumstances of the transaction that the intention of the transferor was that the property transferred should permanently remain in the transferee. *In re Vansittart, Ex parte Brown*, [1893] 1 Q. B. 181; 62 L. J. Q. B. 277.

Voluntary
conveyances
under 27 Eliz.
c. 4.

With regard to 27 Eliz. c. 4, as amended by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), the object of which is to protect subsequent purchasers or mortgagees against prior voluntary conveyances, in the case of a voluntary settlement the settlor's subsequent judgment creditors cannot, it appears, acquire rights in derogation of it which he would not have possessed.

CHAPTER XXVI.

INTERPLEADER.

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I. INTRODUCTORY.

General.

It will be observed that cases frequently arise where a third party makes an adverse claim to property seized by the sheriff under an execution, and that the latter, but for the following safeguard, would be consequently subjected to considerable risk in the discharge of his duties, to meet which, relief by way of interpleader is provided.

Prior to the Judicature Acts the right of interpleader at common law differed from the right of interpleader in equity. Common law interpleader was regulated by the Interpleader Act (1 & 2 Will. 4, c. 58), and the Common Law Procedure

Act, 1860. These Acts (with the exception of sect. 17 of the Common Law Procedure Act, 1860) are now repealed, and the right of interpleader and practice in interpleader proceedings are regulated exclusively by the Rules of the Supreme Court, 1883, Ord. LVII. (*a*). See the Annual Practice, 1894, p. 1001. The earlier decisions would, however, appear to be still more or less applicable in principle, so far as consistent with the above Order, to which limited extent they are accordingly referred to in this branch.

When relief by interpleader granted to sheriff.

By the R. of S. C. 1883, O. LVII., r. 1, "Relief by way of interpleader may be granted [*inter alia*] where the applicant is a sheriff, or other officer, charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process is issued." As to what are "the proceeds or value" of goods taken in execution within the meaning of this rule, see *Smith v. Critchfield*, 14 Q. B. D. 873; 54 L. J. Q. B. 366.

What applicant for relief must prove to Court.

By Rule 2 of the same Order, "The applicant must satisfy the Court or a judge by affidavit or otherwise (*a*) that the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and (*b*) that the applicant does not collude with any of the claimants; and (*c*) that the applicant is willing to pay or transfer the subject-matter into Court or to dispose of it as the Court or a judge may direct."

Adverse titles of claimants.

By Rule 3, "The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another."

Sheriff's costs prior to notice admitting claim.

By the R. of S. C., Dec. 1889, Ord. LVII., r. 16, "Where a claim is made to or in respect of any goods or chattels taken in execution under the process of the Court it shall be in writing, and upon the receipt of the claim the sheriff or his officer shall forthwith give notice thereof to the execution creditor according to Form 28 in Appendix B. (*b*) or to the like effect, and the execution creditor shall, within four days after receiving the notice, give notice to the sheriff or his officer that he admits or

(*a*) Fully set out under the title "General Practice," *ante*, p. 30.

(*b*) For a copy of the above-mentioned form, see *post*, p. 398.

disputes the claim, according to Form 29 in Appendix B. (c) or to the like effect. If the execution creditor admits the title of the claimant, and gives notice as directed by this rule, he shall only be liable to such sheriff or officer for any fees and expenses incurred prior to the receipt of the notice admitting the claim."

By the R. of S. C., Dec. 1889, Ord. LVII., r. 17, "Where the execution creditor does not in due time, as directed by the last preceding rule, admit or dispute the title of the claimant to the goods or chattels, and the claimant does not withdraw his claim thereto by notice in writing to the sheriff or his officer, the sheriff may apply for an interpleader summons to be issued, and should the claimant withdraw his claim by notice in writing to the sheriff or his officer, or the execution creditor in like manner serve an admission of the title of the claimant prior to the return day of such summons, and at the same time give notice of such admission to the claimant, the judge or master may, in and for the purposes of the interpleader proceedings, make all such orders as to costs, fees, charges, and expenses, as may be just and reasonable."

Costs in
interpleader.

By the Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61), sect. 17, "If it shall appear to the Court or a judge that any proceeding now pending or hereafter commenced in the High Court of Justice by way of interpleader, in which the amount or value of the matter in dispute does not exceed the sum of five hundred pounds (being the limit of the equitable jurisdiction given to the County Court by the County Courts Act, 1865), may be more conveniently tried and determined in a County Court, the Court or judge may at any time order the transfer thereof to any County Court, in which an action or proceeding might have been brought by any one or more of the parties to such interpleader against the others or other of them, if there had been a trust to be executed concerning the matter in question; and every such order shall have the same effect as if it had been for the transfer of a suit or proceeding under sect. 8 of the County Courts Act, 1867; and the County Court shall have jurisdiction and authority to proceed therein, as may be prescribed by any County Court Rules for the time being in force."

Power of
Court to
transfer
interpleader
proceedings
to County
Court.

Care should be exercised by the sheriff in interpleading, that is, he should (except, perhaps, where the execution creditor gives

Sheriff should
make inquiry
before inter-
pleading,

(c) For a copy of the above-mentioned form, see *post*, p. 398.

and should
apply for
relief without
delay,

but he is not
bound to
interplead.

Indemnity
from execu-
tion creditor.

Expenses of
possession
pending final
order.

Adverse
claims to exe-
cution under
Admiralty
process.

Interpleader
provisions do
not apply to
Crown.

Application
to foreigners
out of the
jurisdiction.

notice under Ord. LVII. r. 16, R. of S. C., December, 1889, that he disputes the claim) satisfy himself as to the nature of the claim, and avoid acting too hastily; for not merely refusal of relief, but disallowance of the sheriff's costs, and even his being subjected to the payment of the other parties' costs often result from unnecessary or uncalled-for interpleader proceedings. *Bishop v. Hinzman*, 2 D. P. C. 166; and see *Reg. v. Sheriff of Oxfordshire*, 6 D. P. C. 136; and *Dutton v. Furniss*, 35 L. J. Ch. 463. Moreover, the sheriff must apply without delay or he will be refused relief. *Devereux v. John*, 1 D. P. C. 548; and see *Cook v. Allen*, 2 D. P. C. 11; *Beale v. Overton*, 5 D. P. C. 599; 2 M. & W. 534; and *Mutton v. Young*, 16 L. J. C. P. 309. But it seems that a sheriff is not obliged to interplead. Thus, where goods seized in execution by the sheriff under a *fi. fa.* have been previously assigned by the execution debtor to a third party as security for a debt, the sheriff is not bound to interplead and thereby enable proceedings to be taken for an order to sell (*d*), but he is at liberty to withdraw, though the value of the goods seized exceed the sum secured by the bill of sale, and the execution debtor, therefore, has an equity of redemption which is valuable. *Scarlett v. Hanson*, 12 Q. B. D. 213; 53 L. J. Q. B. 62.

The sheriff is not bound to accept the execution creditor's indemnity in respect of an adverse claim, but may, if he prefer, interplead. *Levy v. Champneys*, 2 D. P. C. 454; and see *Claridge v. Collins*, 7 D. P. C. 698; *Crossley v. Ebers*, 2 H. & W. 216; and *Wilks v. Popjoy*, 10 Leg. O. 12.

The sheriff must pay for keeping possession of the goods pending the Court's final order. *Claridge v. Collins*, 7 D. P. C. 698.

For proceedings where an adverse claim is made to goods taken under Admiralty process, see the Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 16.

The interpleader provisions do not apply to cases where the Crown is an interested party. *Candy v. Maughan*, 6 M. & G. 710; 1 D. & L. 745. But it seems that foreigners residing out of the jurisdiction may be made to interplead. Bramwell, L. J., in the under-mentioned case, said: "It has been suggested that the defendants ought not to be allowed to interplead, because

(*d*) Formerly under sect. 13 of the Common Law Procedure Act, 1860 but now under the R. of S. C. 1883, O. LVII. r. 12.

the claimant Lopez is a foreigner residing out of the jurisdiction of the High Court. That is no ground for rejecting this application, although it may be a reason for making him give security for costs or barring him altogether." *Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 454; and see also *Belmonte v. Aynard*, 4 C. P. D. 221, 352; and *Credits Gerundense v. Van Weede*, 12 Q. B. D. 171.

When Sheriff relieved.

Interpleader proceedings are only applicable where the property in question has been actually claimed by some third party, and the claim made is of such a nature as may be followed by an action. *Isaac v. Spilsbury*, 2 D. P. C. 211; 10 Bing. 3; 3 Moo. & S. 341; and *Bentley v. Hook*, 2 C. & M. 426; 2 D. P. C. 339. *Per* Bayley, B., in *Bentley v. Hook*, *supra*: "The sheriff must show that a claim has been made, as that is the foundation of our jurisdiction." See also *Tarleton v. Dummelow*, 5 Bing. N. C. 110; 6 Scott, 843; and *Barker v. Phipson*, 3 D. P. C. 590. But the sheriff need not wait for proceedings to be taken against him before applying to the Court for relief. *Green v. Brown*, 3 D. P. C. 337.

When interpleader proceedings applicable.

Formerly an equitable claim could not be the subject of an interpleader summons. *Hurst v. Sheldon*, 13 C. B. N. S. 750; and see *Sturgess v. Claude*, 1 D. P. C. 505; and *Roach v. Wright*, 8 M. & W. 155. But it was held, in *Duncan v. Cushin*, L. R. 10 C. P. 554; 44 L. J. C. P. 225, that upon an interpleader issue the Court will take notice of equitable rights. And see *Engleback v. Nixon*, L. R. 10 C. P. 645; 44 L. J. C. P. 396; *Rusden v. Pope*, L. R. 3 Ex. 269; 37 L. J. Ex. 137; and *Shingler v. Holt*, 30 L. J. Ex. 322. Moreover now, by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 24, sub-sect. 4, "The said Courts respectively, and every judge thereof, shall recognize and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act."

Equitable claims may be subject of interpleader.

The sheriff may apply for an interpleader order where the execution debtor claims the seized effects, *quâ* executor, the

Execution debtor claiming as executor.

latter being in such a case considered a claimant for interpleader purposes. *Fenwick v. Laycock*, 1 G. & D. 532; 2 Q. B. 108.

Claim for
lien.

Moreover, the Court will relieve the sheriff in the case of conflicting claims on property seized by him, though that claim is only of a lien, and not of the whole property. *Ford v. Baynton*, 1 D. P. C. 357; and see *Frith v. Simpson*, 13 Q. B. 480.

Goods in
stranger's
possession.

The fact of the seized effects being in a stranger's possession, and not in that of the execution debtor, is no bar to the sheriff in applying for an interpleader order. *Allen v. Gibbon*, 2 D. P. C. 292; and see *Barker v. Dynes*, 1 D. P. C. 169.

Various writs.

In the case of *Stowman v. Back*, 3 B. & Ad. 103, an interpleader order was made where goods had been taken by the sheriff under a *fi. fa.*, and sold by him, another *fi. fa.* having been issued in the meantime against the same goods, and where a party claimed a title to the property against both the plaintiffs, the defendant and the sheriff, and complained that the goods had been sold improvidently, and in spite of notice from the owner.

Conflicting
claimants, and
defendant
bankrupt.

Where there are conflicting claimants to property seized under a *fi. fa.*, the defendant having become bankrupt, the Court will interfere, and protect the sheriff. *Parker v. Booth*, 1 Moo. & S. 156; *S. P.*, *Northcote v. Beauchamp*, 1 Moo. & S. 158.

Sheriff a
trespasser.

The sheriff can be relieved by way of interpleader as well in respect of actions of trespass against him for breaking and entering a claimant's house as in respect of disputed claims to the seized effects. *Winter v. Bartholomew*, 11 Ex. 704; 25 L. J. Ex. 62. This case appears to have overruled the cases of *Hollier v. Laurie*, 3 C. B. 344, and *Abbott v. Richards*, 3 D. & L. 487; 15 M. & W. 194, where the Court refused to stay proceedings against the sheriff for breaking and entering the house of the claimant.

Claimant may
be married
woman,

or infant.

A married woman may also be a claimant in an interpleader issue. *Shingler v. Holt*, 7 H. & N. 65; 30 L. J. Ex. 322; 7 Jur. N. S. 866; 4 L. T. 76; and see *Bird v. Holt*, 30 L. J. Ex. 318; 7 Jur. N. S. 866; 5 L. T. 76. The Court has, moreover, power to give a sheriff relief though the claimant is an infant. *Claridge v. Collins*, 7 D. P. C. 698; 3 Jur. 894.

When Sheriff not entitled to Relief.

The sheriff cannot apply unless the goods or money in question are actually in his hands. *Scott v. Lewis*, 2 C. M. & R. 289; 4 D. P. C. 259. But, according to *Lea v. Rossi*, 11 Ex. 13; 24 L. J. Ex. 280, the Court may interfere by interpleader order on the sheriff's application if he "intended" to take the goods, although he may not have actually seized them; but such jurisdiction will, it seems, be rarely exercised; and see *Day v. Carr*, 7 Ex. 883. The sheriff is not entitled to relief where, having gone to the premises of the defendant to take his goods under a *fi. fa.*, he has withdrawn without seizing them, on notice of an adverse claim, and has not the goods in his possession when he applies to the Court. *Holton v. Guntrip*, 3 M. & W. 145; 6 D. P. C. 130.

Where goods are not in sheriff's hands,

The sheriff's delivery of part of the seized effects to the claimant will preclude the sheriff from interpleading. *Braine v. Hunt*, 2 D. P. C. 391. Moreover, it was held, in *Anderson v. Calloway*, 1 C. & M. 182; 1 D. P. C. 636, that, if a sheriff pay over the proceeds of an execution to the judgment creditor after notice of a claim, he is not entitled to relief (and see *S. C. nom. Chalou v. Anderson*, 3 Tyr. 237); nor though he had no notice of the claim until after the sale. *Inland v. Bushell*, 2 H. & W. 118; 5 D. P. C. 147.

or have been delivered to claimant, or payment made to judgment creditor.

In a case where the sheriff seized goods in execution which were under distress for rent due to the landlord, the Court refused to grant him relief, though he had applied for indemnity to the execution creditor, which had been refused. It is the duty of the sheriff to inquire whether the rent is due, and if it is, to satisfy it. *Haythorn v. Bush*, 2 D. P. C. 641; and see *Clarke v. Lord*, 2 D. P. C. 55; and *Gethin v. Wilks*, 2 D. P. C. 189. In fact, in no case where the claim is for rent can there be an interpleader. *Bateman v. Farnsworth*, 29 L. J. Ex. 365.

Where rent is due.

The Court will not grant the sheriff relief where he seizes under one *fi. fa.*, and the question is, whether that writ ought to have preference of another. *Day v. Walldock*, 1 D. P. C. 523. In *Salmon v. James*, 1 D. P. C. 369, it was similarly held, that the sheriff was not entitled to relief where he had levied under a *fi. fa.*, and while in possession received notice that other writs of execution had been issued against the defendant's goods. Taunton, J., in that case, said: "The writ will be a sufficient justification to him [the sheriff] for paying over the proceeds of

Where preference of writs is in question.

the levy to the first execution creditor. What signify these notices? that is merely struggling for priority of claim."

Where sheriff
is indemnified,

or has exer-
cised discre-
tion,

or has delayed
in applying
for relief.

If the sheriff be in any way indemnified he is not entitled to relief by way of interpleader. *Ostler v. Bower*, 4 D. P. C. 605; 1 H. & W. 653. But, as previously intimated, he is not bound to accept an indemnity from the execution creditor in respect of a third party's claim, but he may, if he prefer, interplead. Nor is he entitled to relief where he has already exercised a discretion in the matter. *Crump v. Day*, 4 C. B. 760. As already intimated, the sheriff will be refused relief unless he applies without delay after receiving notice of an adverse claim. *Devereux v. John*, 1 D. P. C. 548; and see *Cook v. Allen*, 2 D. P. C. 11; *Beale v. Overton*, 5 D. P. C. 599; 2 M. & W. 534; and *Mutton v. Young*, 16 L. J. C. P. 309. But, under special circumstances, the Court will waive an objection on the ground of delay. *Dixon v. Ensell*, 2 D. P. C. 621. The sheriff must, however, make a special affidavit as to such circumstances. *Cook v. Allen*, *ante*.

Where sheriff
acts dis-
honestly,
or is inte-
rested,

The fact of the sheriff acting dishonestly, or of his conduct having prejudiced either party, disentitles him to relief. *Holt v. Frost*, 3 H. & N. 821; 28 L. J. Ex. 55. Moreover, where the sheriff is interested or suspected of collusion with either of the parties, the Court will not relieve him. *Duddin v. Long*, 3 D. P. C. 139; 1 Scott, 281; and *Ostler v. Bower*, 4 D. P. C. 605; and see *Cox v. Balne*, 2 D. & L. 718; 14 L. J. Q. B. 95; *Murietta v. South American, &c. Co.*, 62 L. J. Q. B. 396; and R. of S. C., 1883, Ord. LVII, r. 2 (b), *ante* p. 374. The fact, however, that the sheriff had, down to the seizure of the execution debtor's goods, acted as the solicitor of a claimant, and had given him notice of the execution, has been held to be not alone sufficient to prevent his calling on the parties to interplead. *Holt v. Frost*, *ante*. But there should not be any intermingling of the character of solicitor and under-sheriff, or of execution creditor (or even of partners of an execution creditor) and under-sheriff. *Duddin v. Long*, and *Ostler v. Bower*, *ante*.

or is guilty of
negligence or
misconduct.

Where the sheriff has been guilty of negligence he is not entitled to relief (*Brackenbury v. Lawrie*, 3 D. P. C. 180), or if he is guilty of misconduct. *Levis v. Jones*, 2 M. & W. 203.

Where claim
is by partner
for interest in
partnership
goods seized
for another

Where the sheriff seizes partnership goods for one partner's debt, he is not entitled to apply for relief on the ground of a claim set up in respect of another partner's interest therein, *quâ* partner, although the claim states that the balance of accounts is

so much in favour of the claimant as to give him the sole beneficial interest in the property seized. Although, if the execution creditor refuse either to admit or deny the partnership, and insist on the goods being sold as the property not of a partnership but of the execution debtor alone, such creditor must indemnify the sheriff, and in default the Court will enlarge the time for the sheriff's return to the writ. *Holmes v. Mentze*, 4 A. & E. 127; 4 D. P. C. 300.

Where goods are taken in execution, and a claim was set up under a bill of sale, dated after the levy, the Court discharged the sheriff's application for relief, and, moreover, ordered him to pay the execution creditor's costs. *In re Oxfordshire (Sheriff)*, 6 D. P. C. 136.

partner's
debt.

Where claim
is under bill
of sale dated
after levy.

II. PROCEDURE.

Application.

By the R. of S. C. 1883, Ord. LVII., r. 5, "The applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them."

As to the time for making the application, see *Hilliard v. Hanson*, (C. A.) 21 Ch. D. 69; 47 L. T. 342; 31 W. R. 151; as also *Aylwin v. Evans*, 52 L. J. Ch. 105; 47 L. T. 568; and *Green v. Brown*, 3 D. P. C. 337.

A claimant who appears in pursuance of an interpleader summons taken out by the sheriff must state in his affidavit, made under the above order and rule, not only the nature but also the particulars of his claim, and the claimant is not entitled to demand from the sheriff any sum not included in the particulars of claim so stated in the affidavit. *Hockey v. Evans*, 18 Q. B. D. 390; 56 L. J. Q. B. 253. But the Court will not order the sheriff to deliver particulars of the goods seized. In *Banly v. Kbrook*, 65 L. T. 377, where a sheriff, under a writ of *fi. fa.*, had seized certain goods as the property of the defendant in an action, which were claimed by the defendant's wife as her separate property, and the claimant applied for an order that the sheriff should deliver particulars of the goods seized, the Court refused the application.

Summons by
applicant.

Time for
application.

Particulars
of claim.

Matters to be proved by applicant.

Not necessary for sheriff to file affidavit,

nor execution creditor ;

but claimant must make an affidavit.

Forms of affidavit.

As already intimated, by Rule 2, "The applicant must satisfy the Court, or a judge, by affidavit or otherwise (a) that the applicant claims no interest in the subject-matter in dispute, other than for charges or costs ; and (b) that the applicant does not collude with any of the claimants ; and (c) that the applicant is willing to pay, or transfer the subject-matter into Court, or to dispose of it as the Court or a judge may direct." It has been held, however, by the recent case of *Stocker v. Heggerty*, 67 L. T. 27, that, in applying for an interpleader summons, a sheriff need not, as a general rule, file an affidavit in support of his application, such affidavit being wholly unnecessary, that, if he does so file an affidavit, he will not be entitled to the costs of the same, and that his proper course is to wait and see if an affidavit is necessary, in which case he can ask for and obtain an adjournment for an affidavit to be filed. As to what is sufficient compliance with the above rule requiring an affidavit of no collusion, see *Jones v. Shepherd*, 30 L. J. Ch. 404 ; and as to collusion, see *Murietta v. South American, &c. Co.*, 62 L. J. Q. B. 396. It would appear to be unnecessary for an execution creditor, appearing on an interpleader summons, to produce an affidavit. *Angus v. Wootton*, 3 M. & W. 310. But a third party (or claimant), called upon in interpleader proceedings to appear and state the nature and particulars of his claim to the property seized by the sheriff, must, it seems, make a statement by affidavit, nor does it appear to be sufficient that he appears by counsel, and that upon affidavits put in by other parties, it appears he has given formal notice of his claim to the sheriff. *Powell v. Lock*, 3 Ad. & E. 315 ; 1 H. & W. 281 ; 4 N. & M. 852 ; and see *Plues v. Capel*, Ex. D., 68 L. T. Journal 354. An affidavit which shows a sufficient maintaining of the claim to justify the direction of an issue will suffice. *Webster v. Delafield*, 7 C. B. 187 ; 6 D. & L. 597 ; 18 L. J. C. P. 186. An affidavit for showing cause may be sworn at any time before cause is shown. *Braine v. Hunt*, 2 D. P. C. 391. Suitable forms of affidavit will be found in Chitty's Forms, 11th edit.

Hearing.

Order upon appearance of claimants to summons.

By Ord. LVII. r. 7, "If the claimants appear in pursuance of the summons, the Court or a judge may order either that any claimant be made a defendant in any action already commenced

in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant." There is no jurisdiction under this rule to limit the defences of a claimant, who is substituted as defendant, to such defences as the original defendant could raise, since the words of the rule empowering the Court or judge to substitute any claimant as defendant "in lieu of" the applicant do not mean that the claimant should stand "in the actual place of," but instead of, such defendant. *Gerhard v. Montague*, 61 L. T. 564; 38 W. R. 76.

By rule 9, "Where the question is a question of law, and the facts are not in dispute, the Court or a judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. If a special case is stated, Ord. XXXIV. [Special Case] shall, as far as applicable, apply thereto." Decision of questions of law.

By rule 8, "The Court or a judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just." See on this rule, *Bryant v. Reading*, 17 Q. B. D. 128. Disposal of matters in summary manner.

The Court had no power, under 1 & 2 Will. 4, c. 58, to dispose summarily of the matter in dispute between the parties, who appeared on the sheriff's rule, without the consent of both plaintiff and claimant. *Curlewis v. Pocock*, 5 D. P. C. 381. In *Harrison v. Wright*, 13 M. & W. 816; 2 D. & L. 695, certain goods having been seized by the sheriff under an execution, a third party claimed to be entitled thereto, whereupon the sheriff obtained an interpleader rule, and brought the plaintiff and the claimant before a judge at chambers, who decided that the goods belonged to the claimant, and ordered the sheriff to deliver up possession of them to him, and the plaintiff to pay the costs of claimant and the sheriff. The order was not stated on the face of it to have been made by consent, but was in fact so made. The plaintiff accordingly paid the costs, pursuant to the order, and the sheriff gave up possession of the goods; but the plaintiff, having discovered that there was other property in the debtor's possession which did not belong to the claimant, ruled the sheriff to return the writ, and on his returning *nulla bona*

brought an action against him for false return. It was held, first, that the judge had no authority under 1 & 2 Will. 4, c. 58, to make such an order without the consent of the parties; and, secondly, that although the order was bad on that ground as an interpleader order, still it was binding and conclusive upon the parties as an award between them, the parties having, by their conduct, agreed to submit the matter to the decision of the judge. And see *Buddock v. Beauchamp*, 8 Bing. 86; 1 Moo. & S. 158; and *Sloman v. Back*, 3 B. & Ad. 103.

Order to sell
goods seized
in execution.

By Rule 12, "When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner, and upon such terms as may be just." But it was held, in *Howell v. Dawson*, 13 Q. B. D. 67, that on an interpleader issue being ordered to try the right to goods in execution the Court or a judge may, under the Judicature Act, 1873, sect. 25, sub-sect. 8, and Ord. LVII. r. 15, *post*, p. 388, order that, instead of a sale by the sheriff, a receiver and manager be appointed (following the decision in *Pearce v. Watkins*, 2 F. & F. 377, that an order will not be made for the sale of goods seized in execution under sect. 13 of the Common Law Procedure Act, 1860, except under special circumstances, nor, *semble*, unless the value of the saleable goods is shown to exceed the amount of the secured debt).

Where sheriff
applies for
relief, trial
will not be
by affidavit.
Security for
costs, when
ordered.

Where application is made by the sheriff for relief, the Court will not try the merits of the respective claims upon affidavit. *Bramidge v. Adshead*, 2 D. P. C. 59.

In interpleader proceedings instituted by a sheriff, a company which has been wound up, although made defendant to the issue, may be ordered to give security for costs. *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539; 53 L. J. Q. B. 561 (*Williams v. Crossling*, 3 C. B. 957 followed; *Belmonte v. Aynard*, 4 C. P. D. 221, 352 distinguished). *Per Brett, M.R.*: "If either of the parties to the issue arising out of a sheriff's interpleader be a limited company and be insolvent it may be compelled to give security for costs." And the Court will, it seems, compel a claimant residing out of the jurisdiction and seeking to be made a party to an interpleader issue to give security for costs.

The master or a judge at chambers, on an interpleader order, has power to restrain an action against the execution creditor as well as against the sheriff. *Carpenter v. Pearce*, 27 L. J. Ex. 143. Power to stay proceedings.

By Rule 10, "If a claimant, having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or a judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves." Non-appearance of claimant or neglect to obey order.

An execution creditor, served with a sheriff's rule, is not bound to appear when there are no goods liable to his execution. *Glazier v. Cooke*, 5 N. & M. 680. If an execution creditor does not appear on being served with the sheriff's rule, the Court cannot bar his claim. *Donniger v. Hineman*, 2 D. P. C. 424. In *Doble v. Cummins*, 7 Ad. & E. 580; 2 N. & P. 575, goods being seized by the sheriff under a *fi. fa.* were claimed adversely to the execution creditor. On an interpleader rule, obtained by the sheriff, the claimant and the sheriff appeared, but not the execution creditor. The claimant supported his title by affidavit. The Court refused to order generally that the execution creditor should be barred of his demand, but made a rule that the sheriff should withdraw from possession, and the execution creditor take no proceedings against him in respect of the goods non-claimed. Non-appearance of execution creditor.

If an execution creditor abandon his process against certain goods, seized under a *fi. fa.*, in favour of a claimant, the sheriff has still a right to show in an action against him that the goods were the property of the defendant. *Baynton v. Harvey*, 3 D. P. C. 344. Abandonment of process by execution creditor.

Upon an interpleader rule obtained on behalf of the sheriff, neither plaintiff nor claimant appearing after service of the rule, the Court ordered so much of the goods to be sold as would satisfy the sheriff's charges and the rest to be abandoned. *Eveleigh v. Salisbury*, 3 Bing. N. C. 298; 5 D. P. C. 369. Non-appearance of both parties.

Where the sheriff applies to the Court for protection, no one has a right to be heard against the rule, unless he is called upon by the rule, though he is, in fact, a claimant; and, if he is called on in one character, he cannot appear in another. *Clarke v. Lord*, 2 D. P. C. 55. But where a sheriff, having levied on the goods How far parties entitled to be heard against sheriff's rule.

of the defendant, received notice of his bankruptcy, and of a claim by the provisional assignee, "or of any other persons who might be appointed assignees," and after the assignees were appointed, the sheriff obtained an interpleader rule, calling on the provisional assignee only to appear, it was held (*per* Rolf, B.), that the assignees were entitled to appear on that rule. *Ibbotson v. Chandler*, 9 D. P. C. 250; and see *Kirk v. Clarke*, 4 D. P. C. 363.

Amending,
&c. order
directing trial
of issue.

As to rescinding or amending an order directing a trial of an issue, see *Luckin v. Simpson*, 8 Scott, 676.

Title of order
in inter-
pleader pro-
ceedings.

By Ord. LVII. r. 14, "Where in any interpleader proceeding it is necessary or expedient to make one order in several causes or matters pending in several divisions, or before different judges of the same division, such order may be made by the Court or judge before whom the interpleader proceeding may be taken, and shall be entitled in all such causes or matters; and any such order (subject to the right of appeal) shall be binding on the parties in all such causes or matters."

Issue.

Parties to
the issue.

The interpleader order directing the issue to be tried will indicate the parties to the issue; where the sheriff is the applicant for relief by interpleader, the claimant will be the plaintiff in the issue, and the execution creditor will be the defendant. An execution creditor does not by becoming a party to an interpleader issue ratify or adopt the act of a sheriff so as to render himself liable for the seizure of the goods which are the subject of the interpleader issue. *Woollen v. Wright*, 1 H. & C. 554; 31 L. J. Ex. 513.

Framing and
delivery of
issue.

As to the framing and delivery of the issue by the plaintiff the following remarks are made in Chitty's Archbold at p. 1360:—"If an issue is directed to be tried between the parties, the party directed to be plaintiff should frame it. [For the form see Chitty's Forms, p. 696.] The plaintiff must deliver the issue within the time limited by the order, or if no time be limited, and he neglect to deliver it within a reasonable time, an order may be obtained, or the order amended, limiting the time for its delivery. If not delivered by the plaintiff within the time limited, an order may be obtained for delivery

over to the claimant of the subject matter in dispute with costs."

By Ord. LVII. r. 13, "Orders XXXI. and XXXVI. shall, with the necessary modifications, apply to an interpleader issue; and the Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for." Ord. XXXI. relates to discovery, and Ord. XXXVI. to trial. And see on this rule, *Robinson v. Tucker*, (C. A.) 53 L. J. Q. B. 317; 50 L. T. 381.

Application of
Ords. XXXI.
and XXXVI.
to inter-
pleader pro-
ceedings.

Formerly, under the Interpleader Act, an interpleader issue could not be tried by a judge without a jury (*Hamlyn v. Betteley*, 6 Q. B. D. 63; 50 L. J. Q. B. 1); but now since the R. of S. C., 1883, unless trial by jury is expressly ordered under the provisions of Ord. XXXVI., it seems that the issue must be tried by a judge alone. As to the application of Ord. XXXVI. to interpleader issues, see Ord. LVII., r. 13, *ante*.

Mode of trial.

On an interpleader issue, where the question was, whether certain goods, &c., seized by the sheriff under a *fi. fa.*, issued upon a judgment, were the property of the plaintiffs as assignees of a bankrupt, or of the defendant the execution creditor, and the defendant pleaded that by virtue of such *fi. fa.* and as against the plaintiff he was entitled to the proceeds of the goods, &c., it was held that the plaintiffs were entitled to begin at the trial. *Edwards v. Matthews*, 4 D. & L. 721; 16 L. J. Ex. 291.

Right to
begin at trial
of issue.

Judgment.

By Ord. XL. r. 10, "Upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit."

Judgment
upon motion
for judgment
or new trial.

In this connection by Ord. XL. (Motion for Judgment) r. 2, "Every referee to whom a cause or matter shall be referred for

Judgment to
be entered
by referee.

trial shall direct how judgment shall be entered, and such judgment shall be entered accordingly by a master or registrar as the case may be"; and see the note on this rule in the Annual Practice, 1894, p. 766, and also rr. 3, 4, 5, and 6 of the same Order.

Costs.

(1.) *Preliminary.*

Sheriff's costs prior to notice admitting claim.

As to the sheriff's costs incurred prior to his receipt of the notice admitting the claim, see Ord. LVII. r. 16, R. of S. C., Dec. 1889, *ante*, p. 374.

Court to make orders as to costs.

By Ord. LVII. r. 13, "The Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for"; and by Rule 15, "The Court or a judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable." This order, however, only empowers the master to deal with the costs of the interpleader proceedings before him, all other costs being by Ord. LIV. r. 12, excepted from his jurisdiction. *Hansen v. Maddox*, 12 Q. B. D. 100; 53 L. J. Q. B. 67. But no costs in matters arising out of interpleader motions are allowed until the termination of the proceedings. *Hood v. Bradbury*, 6 M. & G. 981; 7 Scott, N. R. 892.

Costs where claimant withdraws or execution creditor admits claim.

Where, in the case of a sheriff's interpleader summons, the claimant withdraws his claim to goods, seized by the sheriff, by notice in writing to the sheriff or his officer, or the execution creditor in like manner serves an admission of the title of the claimant prior to the return day of such summons, and at the same time gives notice of such admission to the claimant, the judge or master may, in and for the purposes of the interpleader proceedings, make all such orders as to costs, fees, charges, and expenses, as may be just and reasonable. R. of S. C., Dec. 1889, Ord. LVII. r. 17.

Costs where execution creditor does not appear.

Where, in the case of a sheriff's interpleader summons, the execution creditor has not in any way resisted the claim that has been made to the goods he is not liable for any costs. *C. v. D.*, W. N. (1883) 207; and see *Glazier v. Cooke*, 5 N. & M. 680; *Swaine v. Spencer*, 9 D. P. C. 347; and *Prosser v. Mallinson*, 28 Sol. J. 411, 612. It was, however, held in *Bryant v. Ikey*, 1 D. P. C. 428, that where a *fi. fa.* has been issued, and goods

seized under it, and an adverse claim being set up, the sheriff has applied for relief, and the execution creditor does not appear to support his *fi. fa.*, the Court will grant the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor, although not those of the sheriff; and further, that if the execution creditor afterwards appears and opens the rule, the Court will grant the sheriff the costs of his second appearance. See also *Beswick v. Thomas*, 5 D. P. C. 458; and *Hyland v. Lennox*, 28 L. R. Ir. 286.

Where a sheriff is relieved, and an issue is directed to try the rights of adverse claimants, the Court may adjudicate after the trial on the costs of appearing to the sheriff's rule and of the issue. *Seward v. Williams*, 1 D. P. C. 528. Costs where sheriff relieved.

The rules respecting security for costs in interpleader issues follow those in actions. Moreover, no special jurisdiction to require such security in interpleader is given by Ord. LVII. r. 15. *Rhodes v. Dawson*, 16 Q. B. D. 548; 55 L. J. Q. B. 134; and see as to security for costs, *Williams v. Crossling*, 3 C. B. 957; 16 L. J. C. P. 112; *Belmonte v. Aynard*, 4 C. P. D. 352; and *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539; 53 L. J. Q. B. 561. Security for costs.

In an interpleader proceeding on the application of the sheriff, the claimant, if successful, is entitled to recover as costs from the execution creditor the sheriff's charges subsequent to the interpleader order. *Goodman v. Blake*, 19 Q. B. D. 77; 56 L. J. Q. B. 441. Charges of sheriff subsequent to interpleader order.

(2.) *When Sheriff entitled to Costs.*

“Where an order is made on the application of a sheriff, he is entitled to his costs from the period at which he has been called into interpleading action, that is to say, he is entitled, as against an unsuccessful claimant, to costs and possession money from the time of the notice of claim or from the time of sale, whichever would be first; and where a sheriff is ordered to withdraw, he is entitled to costs as against the execution creditor from the time at which the latter authorized the carrying on of the interpleader proceedings, that is generally from the return of the interpleader summons.” *Per* Field, J., in *Searle v. Matthews*, 19 Q. B. D. 77 n.; W. N. (1883) 176; and see also *C. v. D.*, W. N. (1883) 207; *Bransden v. Parker*, 1 T. L. R. 510; and *Goodman v. Blake*, 19 Q. B. D. 77; 56 L. J. Q. B. 441. Claimant unsuccessful.

Sheriff ordered to withdraw by execution creditor.

Abandonment
by claimant.

Where a claimant, after an application for relief, abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue and of the application for those costs. *Scales v. Sargeson*, 4 D. P. C. 231.

Non-appearance of both parties.

Where upon a rule of interpleader obtained on behalf of the sheriff, neither claimant nor plaintiff appeared after service of the rule, the Court ordered so much of the goods to be sold as would satisfy the sheriff's charge, and the rest to be abandoned. *Eveleigh v. Salisbury*, 3 Bing. N. C. 298; 5 D. P. C. 369.

Neglect by claimant to give security when ordered.

Where, in consequence of a claim made on goods seized by a sheriff in execution, the Court ordered the claimant to proceed to trial upon payment of a sum of money into Court, which he neglected to do, and a rule was then obtained to compel him to pay the costs occasioned by his false claim, it was held, that he was liable to pay those costs as well as the costs of that rule, though no previous application had been made to him. *Scales v. Sargeson*, 3 D. P. C. 707.

Claim by agent.

If a claim to goods seized by a sheriff is made by the defendant on behalf of another, which does not appear to be well founded, the Court will make him pay the costs of the sheriff's application. *Lewis v. Eicke*, 2 D. P. C. 337; 2 C. & M. 321. Where a claim is made by one on behalf of another to goods seized by the sheriff in execution, and, upon a rule being obtained, neither party appears to show cause, the plaintiff is not entitled to receive his costs from the sheriff, but the sheriff and the plaintiff are both entitled to their costs from the claimant or his agent, upon a rule to show cause. *Philby v. Ikey*, 2 D. P. C. 222; and see *Lott v. Melville*, 10 L. J. C. P. 279.

Costs of possession and sale.

The sheriff will be allowed his costs of keeping possession, after making the application, where it is for the benefit of the parties, and not in furtherance of his duty. *Underden v. Burgess*, 4 D. P. C. 104. The Court will allow a sheriff to deduct the expenses of a sale effected by the authority of the Court under interpleader proceedings, although it appears on the trial of an issue that the seizure was wrongful. *Bland v. Delaus*, 6 D. P. C. 293; and see *Dabbs v. Humphries*, 1 Scott, 325; 1 Bing. N. C. 412; 3 D. P. C. 377; and *West v. Rotherham*, 2 Bing. N. C. 527. Although the sheriff is not actually allowed costs, yet, when he has retained possession of the goods seized at the request of the execution creditor, and has sold them with consent of all the parties, and the execution creditor

afterwards abandons his claim, the sheriff is entitled to receive from him his costs of such possession and sale. *Dabbs v. Humphries*, *ante*, p. 390.

Where an interpleader has been directed on the application of the sheriff, and the claim of the third party fails, the strict form of order upon which the sheriff is entitled to insist, is to direct the execution creditor to pay the sheriff's charges of the interpleader, with a remedy over to the execution creditor against the third party, though it is a common form of order simply to order the third party to pay them to the sheriff. *Smith v. Darlow*, (C. A.) 26 Ch. D. 605. In this case the sheriff's possession money caused by the claim was included in his (the sheriff's) allowed costs, and the sheriff was held to be entitled to deduct his costs from money in hand.

In *Ex parte Streeter*, *In re Morris*, 19 Ch. D. 216; 45 L. T. 634, the sheriff's costs of the appeal were ordered to be paid by the party who should ultimately be decided to be in the wrong.

Costs of
appeal.

(3) *When Sheriff not entitled to costs.*

Formerly in ordinary cases the Court did not allow the sheriff his costs of applying for a rule (*West v. Rotherham*, 2 Scott, 802; 2 Bing. N. C. 527), nor was he entitled to his costs on an application under the Interpleader Act (1 & 2 Will. 4, c. 58), s. 6; and his claim to poundage depended on the legality of the seizure. *Barker v. Dynes*, 1 D. P. C. 169.

Moreover, a claimant who fails to appear on an interpleader rule obtained by the sheriff, is not bound to pay the sheriff his costs. *Jones v. Lewis*, 8 M. & W. 264; 5 Jur. 873; and see *Perkins v. Burton*, 2 D. P. C. 108; 3 Tyr. 51; and *Oram v. Sheldon*, 1 Scott, 697; 3 D. P. C. 640. In a case coming within Ord. LVII. r. 10, the Court will make the claimant pay the judgment creditor his costs of appearing on the sheriff's rule; but will not allow the sheriff his costs. *Bowdler v. Smith*, 1 D. P. C. 417; and see *Perkins v. Burton*, 3 Tyr. 51; 2 D. P. C. 108; *Twogood v. Morgan*, 3 Tyr. 52; *Ford v. Dillon*, 5 B. & Ad. 885; 2 N. & M. 662; and *Williams v. Richardson*, 36 L. T. 505.

Non-appearance of
claimant.

When in the case of a sheriff's interpleader summons the execution creditor withdraws, not having previously given any authority to the sheriff to contest the claim, the sheriff is not entitled to any costs against him. *C. v. D.*, W. N. (1883) 207.

Withdrawal
of execution
creditor
without
authorizing
sheriff to con-
test claim.

Per Field, J., "The question referred to me by the Master is whether the sheriff is entitled to any costs as against the execution creditor. The facts are that a claim was made, the sheriff served an interpleader summons, and upon the return of the interpleader summons the execution creditor withdrew, not having previously given any authority to the sheriff to contest the claim. Under these circumstances, I think that the sheriff is not entitled to any costs. The law imposes upon the sheriff the duty of executing the writ, but relieves him from the consequences of taking another person's goods by allowing him to take out a summons to interplead. The execution creditor in the present case has not in any way resisted the claim that has been made to the goods, and ought not, therefore, to be liable to any costs."

Non-appearance of execution creditor.

If the execution creditor does not appear the Court will not order him to pay the sheriff the costs of keeping possession. *Field v. Cope*, 2 C. & J. 480; 1 D. P. C. 567; and see *Bowdler v. Smith*, 1 D. P. C. 417; and *Perkins v. Burton*, 2 D. P. C. 108.

Arrangement between parties.

The sheriff was not entitled to costs where the parties came to an arrangement, after an order made under the Interpleader Act, unless it could be shown that their proceedings were vexatious. *Cox v. Fenn*, 7 D. P. C. 50; 2 Jur. 945.

Costs of appeal.

In *Ex parte Webster*, *In re Morris*, 22 Ch. D. 136, the order on an interpleader issue between a bill of sale holder and an execution creditor gave the sheriff his costs, to be paid by the bill of sale holder. The bill of sale holder appealed, and by the notice of appeal asked that the sheriff's costs might be paid by the execution creditor. The notice was served on the sheriff, and he appeared by counsel on the hearing of the appeal. His counsel took no part in the argument of the appeal, but only asked for costs. It was not suggested that the execution creditor was not as well able to pay the sheriff's costs as the bill of sale holder. It was held that, though it was an error to serve the sheriff with a formal notice of the appeal, he ought not to have appeared on the hearing, and that he was not entitled to any costs of the appeal.

Costs of keeping possession.

Where a sheriff, having seized certain horses which were claimed by a third party, applied for relief and obtained a judge's order that, on payment of a sum of money into Court and on payment to the sheriff of possession money from the date of the order, the sheriff should withdraw from possession, it was

held, that the sheriff was not entitled to detain the horses for the expense of their keep. *Gaskell v. Sefton*, 14 M. & W. 802; 15 L. J. Ex. 107. *Per* Pollock, C.B.: "The Court will ultimately do justice between the parties when the feigned issue is disposed of. But, in the meantime, the question is whether, having regard to the order which requires the sheriff to deliver up the horses on receiving 'possession money,' the sheriff's officer can charge for their keep. I think he cannot. The sheriff might have applied for their keep when the parties were before the judge, who would have allowed it, if he had thought the sheriff ought to have it."

The Court would not under the Interpleader Act allow the sheriff his costs incurred in keeping possession in consequence of a party refusing to consent to a judge at chambers making an order in the case, no authority for that purpose being given by that Act. *Clarke v. Chetwode*, 4 D. P. C. 635.

As already intimated, in applying for an interpleader summons a sheriff need not, as a general rule, file an affidavit in support, such being wholly unnecessary, and if he does so, he will not be entitled to the costs of such an affidavit. *Stocker v. Heggerty*, 67 L. T. 27.

Costs of filing affidavit.

(4.) *When Sheriff to pay Costs.*

The Court will, on proper grounds shown, order the sheriff, or the execution creditor, to pay a third party, appearing and successfully prosecuting his claim, his costs of such appearance. *Ford v. Dillon*, 3 B. & Ad. 885; 2 M. & N. 662. Moreover, in *Anderson v. Calloway*, 1 C. & M. 182; 1 D. P. C. 636, a rule, obtained on the part of the sheriff under the Interpleader Act calling the parties before the Court, was dismissed with costs; it being held that where, as in that case, a sheriff had paid over the proceeds of the execution of the judgment creditor he was not entitled to relief under that Act. Again, where goods were taken in execution and a claim was set up under a bill of sale dated after the levy, the Court discharged the sheriff's application for relief, and, moreover, ordered him to pay the execution creditor's costs. *In re Oxfordshire (Sheriff)*, 6 D. P. C. 136.

Claimant successful.

Payment of proceeds by sheriff to execution creditor.

Claim under bill of sale dated after levy.

Before the sheriff applies to the Court for relief, he is bound to inquire into the nature of the claim set up; and therefore, if he brings parties before the Court in consequence of a claim which is clearly bad in point of law, the Court will compel him

Claim bad in law.

to pay the costs. *Bishop v. Hinaman*, 2 D. P. C. 166. In this case, however, the judgment creditor was not allowed his costs on the ground that he had not repudiated his claim, and that therefore the sheriff might have thought that he intended to persevere in it.

(5.) *When Each Party to pay his own Costs.*

Where the sheriff applies to the Court for relief, and no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party must pay his own costs. *Morland v. Chitty*, 1 D. P. C. 520.

New Trial.

Application
and grounds
for new trial.

A new trial may be applied for on the same grounds as in an ordinary action, and the application is regulated by the same rules. *Robinson v. Tucker*, 53 L. J. Q. B. 317; 50 L. T. 381; and see *James v. Whitbread*, 11 C. B. 406; 20 L. J. C. P. 217. As to new trial, see R. S. C. 1883, Ord. XXXIX., as also Ord. XL. r. 10, *ante*, p. 387. Application for a new trial of an interpleader issue must be made to a Divisional Court. *Robinson v. Tucker*, *ante*. But the fact of the judge having directed the wrong party to begin at Nisi Prius is not a ground for new trial unless it also appears that a substantial injury has been thereby done. Moreover, if in the case of an issue directed to inform the conscience of the Court, the Court are satisfied with the result, they will not grant a new trial, although the judge who tried the cause may have directed the wrong party to begin. *Edwards v. Matthews*, 4 D. & L. 721.

Power of
Court to enter
judgment
instead of
ordering new
trial.

Referring to Ord. XL. r. 10, such rule applies as well to proceedings in interpleader as to ordinary actions, although the old practice in interpleader is preserved by Ord. I. r. 2. Therefore, on a rule for a new trial of an interpleader issue, the Court has jurisdiction to direct judgment to be entered instead of ordering a new trial. *Williams v. Mercier*, (C. A.) 9 Q. B. D. 337; 51 L. J. Q. B. 594; and see judgments of Jessel, M.R., and Lindley, J., therein.

Appeal.

By sect. 17 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which is the only unrepealed and still applicable section of that statute relating to interpleader, "the judgment in any such action or issue as may be directed by the Court or a judge in any interpleader proceedings and the decision of the Court or judge in a summary manner shall be final and conclusive against the parties and all persons claiming by from or under them." See also *Dodds v. Shepherd*, 1 Ex. D. 75. But it was held, in *Witt v. Parker*, (C. A.) 46 L. J. Q. B. 450; 36 L. T. 538, that an appeal will lie to the Court of Appeal from a judgment on the trial of an interpleader issue, notwithstanding sect. 17 of the Common Law Procedure Act, 1860, and Ord. I. r. 2 of the Judicature Act, 1875; and by *Smith v. Darlow*, (C. A.) 26 Ch. D. 605; 53 L. J. Ch. 696, that such section did not make a summary decision under the Act final against the sheriff, and that he could appeal without leave. See also *Westerman v. Rees*, W. N. (1883) 228. And a person, against whom an order is made on his default in appearing, may appeal from the order on its merits. *Ex parte Streeter, In re Morris*, (C. A.) 19 Ch. D. 216; 45 L. T. 634 (*Dodds v. Shepherd*, ante, considered).

By the R. S. C., 1883, Ord. LVII. r. 11, "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way, under Rule 8 of this order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal." And see on this rule, *Webb v. Shaw*, 16 Q. B. D. 658; 55 L. J. Q. B. 249; and as to decision of master, see *Bryant v. Reading*, 17 Q. B. D. 128; 55 L. J. Q. B. 253; *Clench v. Dooley*, 56 L. T. 122; *Waterhouse v. Gilbert*, 15 Q. B. D. 569; 54 L. J. Q. B. 440; and *Westerman v. Rees*, W. N. (1883) 228.

When in an interpleader issue, it is desired to appeal from the final judgment of the judge, leave must be obtained and that appeal lies to the Court of Appeal. If it is desired both to move for a new trial and to appeal from the final judgment of the judge, then by Ord. XL. r. 5, both applications must be made in interpleader, as in other cases, in the first instance to a

In what cases appeal allowed in interpleader proceedings, and procedure.

Divisional Court, from the judgment of which Court an appeal lies to the Court of Appeal. *Robinson v. Tucker*, 14 Q. B. D. 371; 53 L. J. Q. B. 317; 50 L. T. 381; (*Burstall v. Bryant*, 12 Q. B. D. 103, overruled). Where after verdict the judge enters judgment no appeal lies without leave. *Field v. Revington*, 5 T. L. R. 642. By Ord. XL. r. 5, "An application under rules 3 and 4 of this order shall be to the Court of Appeal."

Where it is sought to impeach the judgment of a judge on the trial of an interpleader issue with respect only to the finding of the facts or the ruling of the law, and not with respect to the final disposal of the whole matter of the interpleader proceedings, an appeal will lie from such judgment under sect. 19 of the Judicature Act, 1873, as it will from any other judgment or order of a judge. *Dawson v. Fox*, (C. A.) 14 Q. B. D. 377; 54 L. J. Q. B. 299; and see *Witt v. Parker*, *ante*.

When a judge at chambers refers an interpleader summons to the Court, and the Court gives judgment and makes an order thereon without directing an issue, that order is final and no appeal can be brought from that judgment. *Turner v. Bridgett*, (C. A.) 9 Q. B. D. 55; 51 L. J. Q. B. 377. In view of sect. 20 of the Appellate Jurisdiction Act, 1876, and sect. 17 of the Common Law Procedure Act, 1860, even when read with Ord. LVII. r. 11, there is no appeal from the High Court to the Court of Appeal upon a summary disposal of a claim in interpleader under Ord. LVII. r. 8, with or without leave to appeal being given. *Waterhouse v. Gilbert*, *ante* (upheld in *Bryant v. Reading*, *ante*).

A summary decision under Order LVII. r. 8 by a judge at chambers on an interpleader summons is final and conclusive, and no appeal lies from such decision, and there is no power to give leave to appeal. *Lyon v. Morris*, 19 Q. B. D. 139; 56 L. J. Q. B. 378; and see *Evans v. Thomas*, W. N. (1887) 231. Moreover, if upon an interpleader summons, where the question is a question of law and there are no facts in dispute, the judge at chambers under Ord. LVII. r. 9 decides the question without directing an issue, his decision is final and conclusive, and there is no power to give leave to appeal. *In re Tarn*, (C. A.) [1893] 2 Ch. 280; 62 L. J. Ch. 564; 68 L. T. 311.

The provision in sect. 49 of the Judicature Act, 1873, that no order of the Court or any judge thereof as to costs only shall be subject to any appeal, except by leave, applies to orders made in interpleader proceedings as well as to orders in other proceedings

in the High Court. *Hartmont v. Foster*, (C. A.) 8 Q. B. D. 82; 51 L. J. Q. B. 12.

In the case of *Hetherington v. Groom*, W. N. (1884) 26, an *ex parte* application was made to the Court of Appeal for leave to appeal from a decision of Hawkins, J., on an interpleader issue as to the validity of a bill of sale, and it being an application which, according to Ord. LVIII. r. 10, might be made to the Court of Appeal *ex parte*, the question was whether this should be allowed without previous notice having been given to the opposite party. The Court said that it would not be allowed as a matter of course, still that it was not necessary that notice should be given in every case, and on this case leave was granted after hearing the nature of the case, from which it appeared on the face of the proceedings there was a good objection to the bill of sale.

By Ord. LVIII. r. 15, "No appeal to the Court of Appeal from an interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the order or judgment is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal." An order absolute for a new trial is an interlocutory order, an appeal from which must be brought within twenty-one days from the date thereof under the above rule. Moreover, where a party failed to appeal from such interlocutory order within twenty-one days, under the mistaken belief that such order was final, and that an appeal might be brought at any time within twelve months, it was held, that such mistake was not a circumstance which would justify the Court in enlarging the time for appealing after the expiration of the twenty-one days under Ord. LVII. r. 6. *Highton v. Treherne*, (C. A.) 48 L. J. Ex. 167; 39 L. T. 411. An appeal from the decision of a judge on an interpleader issue, tried by him without a jury, must,

Time for
appealing
from inter-
locutory and
final orders.

under Ord. LVIII. r. 15, be brought within twenty-one days. *McNair v. Audenshaw Paint Co.*, [1891] 2 Q. B. 502; 60 L. J. Q. B. 770.

Appeal from
County Court
in inter-
pleader pro-
ceedings.

As to appeal from the County Court in interpleader proceedings, see *Collis v. Lewis*, 20 Q. B. D. 202; 57 L. J. Q. B. 167; and *Thomas v. Kelly*, 13 App. Cas. 506.

Forms of Notices, Interpleader Orders, &c.

1. *Notice of Claim to Goods taken in Execution* (Form No. 28, App. B., R. of S. C. 1883).

Take notice that A. B. has claimed the goods [*or certain goods*] [*where only certain goods are claimed here enumerate them*] taken in execution by the sheriff of _____, under the warrant of execution issued in this action. You are hereby required to admit or dispute the title of the said A. B. to the said goods and give notice thereof in writing to the said sheriff within four days from the receipt of this notice, failing which the said sheriff may issue an interpleader summons. If you admit the title of the said A. B. to the said goods and give notice thereof in manner aforesaid to the said sheriff you will only be liable for any fees and expenses incurred prior to the receipt of the notice admitting the claim.

Dated, &c.

(Signed)

To the plaintiff,

Sheriff of _____.

2. *Notice of Plaintiff of Admission or Dispute of Title of Claimant* (Form No. 29, App. B., R. of S. C. 1883).

Take notice that I admit [*or, dispute*] the title of A. B. to the goods [*or, to certain of the goods, namely (set them out)*] seized by you under the execution issued under the judgment in this action.

(Signed)

Plaintiff

or

Solicitor.

To the sheriff of _____, }
and his officers. }

3. *Interpleader Affidavit by Bailiff.*

In the _____.

Between

- - - - Plaintiff

and

- - - - Defendant

I _____ of _____ in the _____ of _____ bailiff to the sheriff of _____ make oath and say:—

1. That on or about the _____ day of _____ a writ of *fiery facias* in this cause was delivered to the said sheriff for execution indorsed to levy the sum of £ _____ besides &c. returnable immediately after

the execution thereof, and a warrant thereon was granted by the said sheriff to me as bailiff to the said sheriff.

2. And I further say that on or about the day of I did seize and take in the bailiwick of the said sheriff divers goods and chattels as the property of the said defendant which said goods and chattels are still in my custody and keeping as bailiff to the said sheriff.

3. And I further say that on or about the day of I was served with a notice signed by claiming the said goods and chattels as the property of .

4. And I further say that this application is made at my own expense and for my own indemnity, and without collusion with the defendant or any other person or persons whomsoever.

5. And I further say that I am not nor is the said sheriff to my knowledge or belief indemnified by any person or persons whomsoever.

Sworn at this)
day of 18)
 Before me

4. *Interpleader Order (No. 1)* (Form No. 50, App. K., R. of S. C., 1883).

18 . [*Here put the letter and number.*]

In the High Court of Justice,
Division.
in Chambers.

Between , Plaintiff, and , Defendant,
and

Between , Claimant, and , Respondent.

Upon hearing and upon reading the affidavit of ,
filed the day of , 18 , and .

It is ordered that the claimant be barred, that no action be brought against the above-named [*sheriff*], and that the costs of this application be

Dated the day of , 18 .

5. *Interpleader Order (No. 1a)* (Form No. 50A, App. K., R. of S. C. 1883(e)).

18 . [*Here put the letter and number.*]

In the High Court of Justice,
Queen's Bench Division
Master .

Master in Chambers.

Between Plaintiff,

and

Defendant,
Claimant.

Upon hearing the solicitors for the plaintiff, the claimant, and the sheriff of , and reading the affidavit of .

It is ordered that the sheriff withdraw from possession of the

(e) An additional form prescribed by the masters for official use under Ord. LXI. r. 33.

goods seized by him, under the writ of *feri facias* herein and claimed by the claimant, that no action be brought,

And that the pay to the the costs of the interpleader to be taxed, and possession money to the sheriff.

Dated the day of , 18 .

6. *Interpleader Order (No. 2)* (Form No. 51, App. K., R. of S. C. 1883).

18 . [*Here put the letter and number.*]

In the High Court of Justice,

Division.

in Chambers.

Between , Plaintiff, and , Defendant,
and

, Claimant.

Upon hearing and upon reading the affidavit of ,
filed the day of , 18 , and

It is ordered that the above-named claimant be substituted as defendant in this action in lieu of the present defendant, and that the costs of this application be

Dated the day of , 18 .

7. *Interpleader Order (No. 3)* (Form No. 52, App. K., R. of S. C. 1883.)

18 . [*Here put the letter and number.*]

In the High Court of Justice,

Division,

in Chambers.

Between , Plaintiff, and , Defendant,
and

Between , Claimant, and the said , execution creditor, and , the sheriff of , Respondents.

Upon hearing and upon reading the affidavit of ,
filed the day of , 18 , and

It is ordered that the said sheriff proceed to sell the goods seized by him under the writ of *feri facias* issued herein and claimed by the claimant (*f*), and pay the net proceeds of the sale after deducting the expenses thereof, into Court in this cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the said claimant shall be the plaintiff and the said execution creditor shall be the defendant, and that the question to be tried shall be whether at the time of the seizure by the sheriff the said (*f*) goods seized were the property of the claimant as against the execution creditor.

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at .

(*f*) These words have been added under Ord. LXI. r. 33.

And it is further ordered that the question of costs and all further questions be reserved until the trial of the said issue, and that no action shall be brought against the said sheriff for the seizure of the said goods.

Dated the day of , 18 .

8. *Interpleader Order* (No. 4) (Form No. 53, App. K., R. of S. C. 1883.)

[*Heading as in Form 7.*]

Upon hearing, &c.

It is ordered that upon payment of the sum of £ into Court by the said claimant within from this date, or upon his giving within the same time security to the satisfaction of the master [*or as the case may be*] for the payment of the same amount by the said claimant according to the directions of any order to be made herein, and upon payment to the above-named sheriff of the possession-money from this date, the said sheriff do withdraw from the possession of the goods seized by him under the writ of *feri facias* herein and claimed by the claimants (*g*).

And it is further ordered that unless such payment be made or security given within the time aforesaid the said sheriff proceed to sell the said goods, and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, into Court in the cause, to abide further order herein.

And it is further ordered that the parties proceed, &c.

And it is further ordered that this issue, &c.

And it is further ordered that the question of costs, &c.

Dated the day of , 18 .

9. *Interpleader Order* (No. 5) (Form No. 54, App. K., R. of S. C. 1883).

[*Heading as in Form 7.*]

Upon hearing, &c.

It is ordered that upon payment of the sum of £ into Court by the said claimant, or upon his giving security to the satisfaction of the master [*or as the case may be*] for the payment of the same amount by the claimant according to the directions of any order to be made herein, the above-named sheriff withdraw from the possession of the goods seized by him under the writ of *feri facias* issued herein.

And it is further ordered that in the meantime, and until such payment made or security given, the sheriff continue in possession of the goods, and the claimant pay possession-money for the time he so continues, unless the claimant desire the goods to be sold by the sheriff, in which case the sheriff is to sell them and pay the proceeds of the sale, after deducting the expenses thereof and the

(*g*) These words have been added under Ord. LXI. r. 33.

possession-money from this date, into Court in this cause, to abide further order herein.

And it is further ordered that the parties proceed, &c.

And it is further ordered that this issue, &c.

And it is further ordered that the question of costs, &c.

Dated the day of , 18 .

10. *Interpleader Order (No. 6)* (Form No. 55, App. K., R. of S. C., 1883).

[*Heading as in Form 7.*]

The claimant and the execution creditor having requested and consented that the merits of the claim made by the claimant be disposed of and determined in a summary manner, now upon hearing , and upon reading the affidavit of , filed the day of , 18 , and

It is ordered that

And that the costs of this application be

Dated the day of , 18 .

11. *Interpleader Order (No. 7)* (Form No. 56, App. K., R. of S. C., 1883).

[*Heading as in Form 7.*]

Upon hearing and upon reading the affidavit of , filed the day of , 18 , and

It is ordered that the above-named sheriff proceed to sell enough of the goods seized under the writ of *fiery facias* issued in this action to satisfy the expenses of the said sale, the rent (if any) due, the claim of the claimant, and this execution.

And it is further ordered that out of the proceeds of the said sale (after deducting the expenses thereof, and the rent, if any), the said sheriff pay to the claimant the amount of his said claim, and to the execution creditor the amount of his execution, and the residue, if any, to the defendant.

And it is further ordered that no action be brought against the said sheriff, and that the costs of this application be

Dated the day of , 18 .

12. *Interpleader Order (No. 8)* (Form No. 56A, App. K., R. of S. C., 1883 (*h*)).

[*Heading as in Form 5.*]

Upon hearing the solicitors for the plaintiff, the claimant, and the sheriff of , and upon reading the affidavit of .

It is ordered that upon payment of the sum of £ and

(*h*) This additional form has been prescribed by the masters under Ord. LXI. r. 33, for use under the power, given by the Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61), sect. 17, to the Court or a judge to transfer interpleader proceedings to the County Court.

possession money from the date of this order to the said sheriff by the said claimant within seven days from this date the said sheriff do withdraw from the possession of the goods seized by him under the writ of *feri facias* herein and claimed by the claimant.

And it is further ordered that unless such payment be made within the time aforesaid the said sheriff proceed to sell the said goods and retain the proceeds of the sale, after deducting the expenses thereof and the possession money from this date.

And it is further ordered that the said sum of £ , or the proceeds of the said sale (as the case may be) do abide the order of the judge of the County Court to whom the interpleader proceedings herein are hereinafter ordered to be transferred.

And it is further ordered that the interpleader proceedings herein be transferred to the County Court of , holden at .

And it is further ordered that the costs of this application be costs in the interpleader proceedings, and that no action be brought against the said sheriff for the seizure of the said goods.

Dated the day of , 18 .

CHAPTER XXVII.

ASSESSMENT OF DAMAGES AND COMPENSATION.

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I. WRIT OF INQUIRY (ASSESSMENT OF DAMAGES).

Introductory.

Issue and
delivery of
writ.

THIS writ is issued (a) to inquire into the truth of breaches suggested after judgment in default of appearance and to assess damages (8 & 9 Will. 3, c. 8; 3 & 4 Will. 4, c. 42, s. 16), (b) to assess the value of goods and damages on interlocutory judgment in default of appearance in detinue (R. of S. C. 1883, Ord. XIII., rr. 5, 6, and Ord. XXXVI., r. 57 (a)), and (c) for

(a) This rule is, along with the other rules relating to Writ of Inquiry, set out under the title "General Practice," *ante*, p. 21.

assessment of damages generally. It is directed to the sheriff of the county where the action would have been tried. See the Annual Practice, 1894, p. 712. As to the issue of this writ, &c., see Chitty Arch., 14th ed., pp. 1332, 1333. It should be delivered at the office of the sheriff, or his deputy (or of the secondary of the City of London, if the writ has to be executed there), not later than two days before if to be executed in the country, or not later than one day before if to be executed in London or Middlesex.

As to notice of inquiry, see *Yate v. Swaine*, Barnes, 233; *Watson v. Delerois*, 2 C. & M. 425; 2 D. P. C. 396; *Stevens v. Pell*, 2 C. & M. 421; 2 D. P. C. 355; *Jones v. Chune*, 1 B. & P. 363; and *Viner v. Clarke*, 1 Anst. 175. Where a defendant is under terms to take short notice of trial, he is not bound to take short notice of inquiry. *Stevens v. Pell*, ante.

By Ord. XXXVI., r. 56 (a) the provisions of (*inter alia*) rules 14, 15, and 19 of that Order shall, with the necessary modifications, apply to an inquiry pursuant to a writ of inquiry. Rule 14 provides for length of notice of trial, rule 15 for entry of trial, and rule 19 for countermanding notice.

Notice of
inquiry.

Notice and
entry of
trial, &c.

Forms of Writ.

1. *Writ of Inquiry to be executed before the Sheriff on a Judgment by Default of Appearance when the Breaches have been suggested after Judgment.*

18 . [*Here put the letter and number*].

In the High Court of Justice.

Division.

Between A. B. - - - - Plaintiff,

and

C. D. - - - - Defendant.

VICTORIA, by the grace of God, &c. To the sheriff of greeting: Whereas lately before Us in the Division of Our High Court of Justice in an action there depending wherein A. B. was plaintiff and C. D. defendant the said A. B. claimed [*set out the claim as in the indorsement on the writ*].

And such proceedings were thereupon had in Our said Court that the said A. B. ought to recover against the said C. D. his debt aforesaid together with his damages which he had sustained on occasion of the detention thereof. And thereupon the said A. B.

(a) This rule is, along with the other rules relating to Writ of Inquiry, set out under the title "General Practice," ante, p. 21.

according to the statute in such case made and provided suggested upon the roll whereon the said judgment so recovered against the said C. D. as aforesaid is entered, to the effect following, to wit, that the said bond, whereon the said judgment was so recovered against the said C. D. as aforesaid, was made subject to a condition thereunder written, whereby after reciting [*&c., state the recital, if any*] it was declared that if [*&c., state the condition in the past tense*]. And the said A. B. further suggested on the said roll whereon the said judgment so recovered against the said C. D. was and is so entered as aforesaid that [*&c., state the suggestion of breaches, &c., and then proceed thus*] as We have received information from the said A. B. in Our said Court. And the said A. B. having prayed Our writ to inquire of the truth of the aforesaid breaches and to assess the damages which he the said A. B. has sustained thereby: therefore according to the statutes in such case made and provided, We command you the said sheriff by the oath of twelve good and lawful men of your bailiwick duly summoned to appear before you, you diligently inquire of the truth of the said breach [*or breaches*] and assess the damages which the said A. B. hath sustained by reason of the same, and that you send to Us in the Queen's Bench Division of Our High Court of Justice at Westminster, on _____, the inquisition which you shall thereupon take under your seal and the seals of those by whose oath you shall take that inquisition, together with this writ.

Witness, &c.

2. *Writ of Inquiry in Detinue.*

[*Heading as in No. 1.*]

VICTORIA, by the grace of God, &c., To the sheriff of greeting: Whereas A. B. lately in the _____ Division of Our High Court of Justice in a certain action there pending, wherein A. B. is plaintiff and C. D. is defendant and wherein the plaintiff's claim is for a return of [*household furniture, or as in writ*] or their value and damages for their detention by a judgment of Our said Court bearing date the _____ day of _____ 18____, it was adjudged that the said A. B. should recover against the said C. D. the said [*household furniture*] or their value, and also damages for the detention thereof. But because it is unknown to Our said Court what is the value of the said [*household furniture*] and what damage the said A. B. hath sustained by reason of the detention thereof, therefore We command you that by the oath of twelve good and lawful men of your bailiwick you diligently inquire what is the value of the said [*household furniture*] and what damage the said A. B. hath sustained by reason of the detention thereof, and that you send to Us in the _____ Division of Our High Court of Justice on the _____ day of _____ next ensuing the inquisition which you shall thereupon take under your seal and the seal of those by whose oath you shall take that inquisition together with this writ.

Witness [*name of Lord Chancellor*].

Lord High Chancellor of Great Britain
at Westminster the _____ day of
in the year of our Lord 18____.

3. *Writ of Inquiry for Assessment of Damages* (Form No. 8, App. J., R. of S. C. 1883).

[*Heading as in No. 1.*]

VICTORIA, by the grace of God, &c., to the Sheriff of greeting:

Whereas it has been adjudged that the plaintiff recover against the defendant damages to be assessed.

Therefore We command you, that by the oaths of twelve good and lawful men of your bailiwick you inquire what damages the plaintiff is entitled to recover under the said judgment, and that forthwith thereafter you send the inquisition which you shall take thereupon to Our said Court under your seal, and the seals of those by whose oaths you take the inquisition, together with this writ.

Witness, &c.

This writ was issued by, &c.

The defendant is a , and resides at , in your bailiwick.

Holding Courts.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), sect. 18, sub-sect. 1, "A sheriff shall not be bound to hold a County Court except where the holding of such Court is required for the purpose of an election or of the due execution of some writ or for any other specific purpose, in which case he shall hold a Court at the time fixed for such purpose by law or by such writ, or if no time is so fixed, as soon as is reasonably practicable after he is informed of the necessity for holding such Court, or receives such writ, and where more than one Court is required to be held for any such purpose, he shall hold Courts at intervals not exceeding one month from each other" (*b*).

When sheriff
to hold
County Court.

By sub-sect. 2, "A sheriff's County Court shall be held at the place heretofore appointed or authorized by law, or at such other place as the sheriff may from time to time fix."

At what place
to be held.

By sub-sect. 3, "A sheriff shall not hold pleas of the Crown, and shall not under any commission or writ take any inquest whereby any person is indicted."

Sheriff not to
hold pleas of
the Crown,
&c.

By sub-sect. 4, "The sheriff's tourn is hereby abolished."

Sheriff's tourn
abolished.

By sect. 38 of the Sheriffs Act, 1887, the expression "writ" used in that Act, unless the context otherwise requires, includes any process.

Meaning of
expression
"writ."

(*b*) The Under Sheriff of the County of London holds courts for inquiries on specified days.

Summoning Jury.

Summoning
of jury.

The sheriff must forthwith summon a jury of twelve men for an inquiry, and from the ordinary jury book (except in the case of cities, boroughs, &c., as to which see *post*). An order of Court is necessary for a special jury. *Price v. Williams*, 5 D. P. C. 160. The number of jurymen at the trial may, it seems, exceed twelve. The following is a form of summons to a jury on a writ of inquiry:—

Form of
summons.

Jury Summons.

— }
to wit. } ——— v. ———
By Virtue of a Writ of ——— issued out of the Queen's Bench
Division of Her Majesty's High Court of Justice, I hereby summon
and require you to attend at ——— at ——— in the county of
on the ——— day of ——— at ——— of the clock in the
precisely, then and there to serve as a juror in the above action.
Given under my hand and seal of office, this ——— day of
one thousand eight hundred and ———.

Qualification
of jurors on
writs of
inquiry.

With regard to the jurors on any inquiry before a sheriff, by sect. 52 of the Juries Act, 1825 (6 Geo. 4, c. 50), "No man shall be liable to be summoned or impanelled to serve as a juror in any county in England or Wales, or in London, upon any inquest or inquiry to be taken or made by or before any sheriff by virtue of any writ of inquiry, who shall not be duly qualified according to this Act to serve as a juror upon trials at *Nisi Prius* in such county in England or Wales, or in London, respectively: Provided always, that nothing herein contained shall extend to any inquest or inquiry to be taken or made [*inter alia*] by or before any sheriff of any liberty, franchise, city, borough or town corporate not being counties, or of any city, borough or town being respectively counties of themselves, but that the sheriffs in all such places as are herein mentioned, shall and may respectively take and make all inquests and inquiries by jurors of the same description as they have been used and accustomed to do before the passing of this Act."

Sheriff to
fine jurors
for non-
attendance.

By sect. 53 of the same Act, "If any man having been duly summoned and returned to serve as a juror in any county in England or Wales, or in London upon any inquiry before any sheriff shall not, after being openly called three times, appear and serve as such juror, every such sheriff, or in his absence the undersheriff or secondary, is hereby authorized and required

(unless some reasonable excuse shall be proved on oath or affidavit) to impose such fine upon every man so making default as he shall think fit, not exceeding five pounds; and every such sheriff, undersheriff and secondary respectively, shall make out and sign a certificate, containing the christian and surname, the residence and trade or calling of every man so making default, together with the amount of the fine imposed and the cause of such fine, and shall transmit such certificate to the clerk of the peace for the county, riding or division in which every such defaulter shall reside, on or before the first day of the quarter sessions next ensuing; and the same shall be estreated, levied, and applied in like manner, and subject to the like powers, provisions and penalties in all respects as if they had been part of the fines imposed at such quarter sessions."

Subject as above, the statutory provisions, &c. relative to exemption from serving on juries, and the summoning and payment, &c. of jurors at *Nisi Prius* trials (*c*) generally apply *mutatis mutandis* to inquests or inquiries before a sheriff; and see, in particular, on this point the Juries Act, 1825 (6 Geo. 4, c. 50), sects. 1 (*d*), 11, 12, 25 (*e*), 31, 38, 50, 51 and 52; the Juries Act, 1862 (25 & 26 Vict. c. 107), sects. 11 and 12; the Juries Act, 1870 (33 & 34 Vict. c. 77), sects. 6, 8, 9 (*f*), 10, 14, 16, 19, 20 and 21; the Crown Office Rules, 1886, r. 158; the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), sect. 12; and the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), sects. 8 and 29.

Exemption from serving, summoning, payment, &c. of jurors.

With regard to the jurors' fees on an inquiry before a sheriff, see *Vickery v. London, Brighton and South Coast Rail. Co.*, L. R. 5 C. P. 165; 39 L. J. C. P. 169. Such fees are not returnable in the event of the case going off. In Middlesex and London common jurors on inquiries are only paid fourpence each.

Jurors' fees on inquiry.

Jurors on an inquiry cannot, it seems, be challenged.

No challenge on inquiry.

(*c*) As to which, see under title "Assizes and Sessions," *post*, pp. 452 *et seq.*

(*d*) So far as unrepealed by the Statute Law Revision Act, 1890 (53 & 54 Vict. c. 33), and by the Juries Act, 1870 (33 & 34 Vict. c. 77).

(*e*) So far as unrepealed by the Statute Law Revision (No. 2) Act, 1888 (51 & 52 Vict. c. 57).

(*f*) So far as unrepealed by the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54).

Inquiry.

Appointment
of deputy by
sheriff.

Whilst the inquiry is generally held before the undersheriff, the sheriff may appoint a deputy, although one deputy only, to take the inquisition (*Wallace v. Humes*, Barnes, 231); but it seems that it is irregular to appoint anyone except the undersheriff when he resides in the town. The undersheriff cannot, however, depute the execution of this writ to a deputy appointed by him. *Denny v. Trapnell*, 2 Wils. 378. In London the secondary is the deputy.

Form of
appointment
of deputy.

The following is a form of appointment by a sheriff of a deputy to take an inquisition:—

Deputation to take an Inquisition.

County of (to wit) esquire, sheriff of the county
aforesaid, to gentleman, greeting: By virtue of a writ of
inquiry issued out of the Division of Her Majesty's High
Court of Justice to me directed I do hereby authorize and empower
you to summon a jury, and take an inquisition in my name, in a
cause wherein is plaintiff and is the defendant, and
render me an account of what you shall do therein, so that I may
certify the same to the said Court on the day of next
coming; hereof fail not. Given under the seal of my office the
day of , 18 .
(Seal of office.)

By the sheriff.

Entry of
liberties and
franchises
by sheriff.

The sheriff must at once enter all liberties or franchises for the execution of this writ. It is, however, unnecessary to issue a warrant to the bailiff for its execution.

Time and
place for
holding
inquiry.

Subject to any special directions in the writ as to any fixed time and place for holding the inquisition, &c., it may be taken at any time up to and inclusive of the whole of the return day. *Bugbird's Case*, Cro. Eliz. 180; and see *Maul v. Barnard*, 2 Burr. 812. The Court will, moreover, take it that the inquisition under a writ of inquiry was taken on the day before the writ was returned, which (to quote the judgment) is well enough, for it might be executed on that day, and might have been executed before the writ was returned. *Dyke v. Blakston*, 2 Ld. Raym. 1449; Roll. Abr., Process (G) 5; and as to the time and place for holding an inquiry, see further the Sheriffs Act, 1887, s. 18, sub-ss. 1 and 2, *ante*, p. 407.

Notice as to
time of
inquiry.

It is usual to specify in the notice one or more hours in which the inquiry will be held, *e.g.*, between the hours of 10 and 12 in the morning. The defendant should attend punctually at the

time mentioned in the notice. *Beetknife v. Packington*, 1 Barn. 233. On notice to execute a writ of inquiry at a certain hour, the party is not tied down to the exact time fixed by the notice. *Williams v. Frith*, 1 Doug. 198. *Per* Lord Mansfield: "When notice is given for the execution of a writ of inquiry at a certain hour, it is never understood that the time is to be scrupulously adhered to. The sheriff may have prior business which may last beyond the hour." But, according to 14th ed. Chitty Arch., p. 1336, if the plaintiff in the absence of the defendant have the writ executed at a different time or place from that specified in the notice, it will be irregular, and the Court upon application can set it aside.

It is sufficient notice of a plaintiff's intention to appear by counsel before the sheriff on the execution of a writ of inquiry that the plaintiff's solicitor informs the defendant's solicitor of such intention, and where no such intimation has been given, the defendant should apply to the sheriff to put off the execution of the writ. *Elliott v. Nicklin*, 5 Price, 641.

In executing an inquiry the undersheriff, and not his deputy, should administer the oath to the jury. *Rex v. Farrant*, 1 Chitt. 745; *S. C. nom.*, *Rex v. Ferrand*, 3 B. & A. 260. The following are the forms in which a jury is sworn and charged in an inquiry:—

Juror's Oath.

You shall well and truly try all such matters and things as shall be given you in charge touching this writ of inquiry and a true verdict give according to the evidence. So help you God.

Charge to the Jury.

Your charge is to inquire what damages the plaintiff is entitled to recover under the judgment obtained by him in this action.

By the R. of S. C. 1883, Ord. XXXVI. r. 56, the provisions of (*inter alia*) Rules 34, 35, 36, and 37 of that Order shall, with the necessary modifications, apply to an inquiry pursuant to a writ of inquiry. These rules are as follows:—

Rule 34. "The judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit."

Rule 35. "Where a party is brought up to attend the trial or hearing of a cause or matter by virtue of any writ of *habeas corpus* duly issued from the central office, and by reason of the

Notice of intention to appear by counsel.

Swearing and charging jury.

Application of rules to writ of inquiry.

Adjournment of trial.

Habeas corpus to bring up party to attend trial.

pressure of other business, or from any other cause, the trial or hearing of the cause or matter in which such party is concerned is postponed to a future day, a new writ of *habeas corpus* may be issued for such future day, if the Court or a judge shall so direct, without payment of any fee."

Addresses to jury at trial.

Rule 36. "Upon a trial with a jury, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore."

Evidence in mitigation of damages in action for libel or slander.

Rule 37. "In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence" (g).

Evidence in assessment of damages.

Where under the writ of inquiry defendant's plea only involves an admission of plaintiff's right to recover, the defendant cannot adduce, in mitigation of damages, evidence of facts as to the merits, or which, in other words, would be a bar to the action. *Speck v. Phillips*, 5 M. & W. 279. And see Ord. XXXVI. r. 37, *supra*, as to evidence in mitigation of damages in actions for libel or slander.

It would appear that, notwithstanding his not adducing evidence in support, the plaintiff is, in any event, entitled to nominal damages. In an action for slander the defendant suffered judgment by default, and on the execution of the writ of inquiry the plaintiff produced no evidence and the jury assessed the damages at 40*l*. It was held, first, that the plaintiff was not bound to produce any evidence, and, secondly, that the jury were not bound to give nominal damages only. *Tripp v. Thomas*, 5 D. & R. 276; 3 B. & C. 427. In an action for words not actionable *per se*, but constituting an untrue statement

(g) And see as to particulars on inquiry as to damages, *Maxim-Nordenfeldt & Co. v. Nordenfeldt*, W. N. (1893) 95, 112.

maliciously published, which statement is intended or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular known customers, evidence of such general loss of business is admissible and sufficient to maintain the action. *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535.

In an action on a bond for the performance of covenants in a lease, judgment and suggestion of damages to be assessed on the writ of inquiry, the lease need not be proved. *Collins v. Rybot*, 1 Esp. 157. In an action on a policy on a foreign ship, where there is a stipulation that the policy shall be a sufficient proof of interest, if there is judgment by default, the plaintiff on the writ of inquiry need only prove the defendant's subscription to the policy, without giving any evidence of interest. *Thelluson v. Fletcher*, 1 Doug. 315; 1 Esp. 73. Upon a judgment by default, or on demurrer, the contract or contracts are admitted as stated in the declaration, and evidence to contradict them ought not to be admitted. *Stevens v. Pell*, 2 C. & M. 421; 2 D. P. C. 355. At the execution of a writ of inquiry after judgment on demurrer, it is not competent to the defendant to controvert anything but the amount of the sum in demand. *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 368. When a plaintiff in an action upon a bill of exchange has obtained judgment on demurrer to a plea, he may, on execution of a writ of inquiry, recover the amount of the bill without producing it in Court. *Lane v. Mullins*, 2 Q. B. 254.

The regulations respecting the admission of documents in evidence are, it seems, applicable to writs of inquiry.

And see generally as to evidence and assessment of damages upon a writ of inquiry, *Mayne on Damages*, 4th ed., pp. 530—532, as also the following subsequently reported cases as to damages in the indicated subjects, viz.:—Hiring contract, *Macdonnell v. Marston*, 1 C. & E. 281; Warranty of authority, *Ex parte Panmure*, *In re National Coffee Palace Co.*, 24 Ch. D. 367; 53 L. J. Ch. 57; and *Meek v. Wendt*, 21 Q. B. D. 126; 59 L. T. 558; affirmed by the Court of Appeal, W. N. (1889) 14; Breach of warranty, *Hammond v. Bussey*, 20 Q. B. D. 79; 57 L. J. Q. B. 58; Transfer of shares in unregistered company, *Skinner v. City of London Marine Insurance Corporation*, 14 Q. B. D. 882; 54 L. J. Q. B. 437; Restraining sale of shares, *Mansell v. British Linen Co. Bank* (No. 2), [1892] 3 Ch. 159; Misrepresentation in company's prospectus and directors' issue

of debentures in excess of their powers, *Peck v. Derry*, 37 Ch. D. 541; 57 L. J. Ch. 347; *Firbank's Executors v. Humphreys*, 18 Q. B. D. 54; 56 L. J. Q. B. 57; Sale of goods, *Grébert Borgnis v. Nugent*, 15 Q. B. D. 85; 54 L. J. Q. B. 511; *De Mattos v. Great Eastern Steamship Co.*, 1 C. & E. 489; *Rew v. Payne*, *Douthwaite & Co.*, 53 L. T. 932; *Wagstaff v. Shorthorn Dairy Co.*, 1 C. & E. 324; Infringement of patent, *United Horseshoe and Nail Co. v. Stewart*, 13 App. Cas. 401; 59 L. T. 561; Carrier, *Hawes v. South Eastern Rail. Co.*, 54 L. J. Q. B. 174; 52 L. T. 514; *Schulze v. Great Eastern Rail. Co.*, 19 Q. B. D. 30; 56 L. J. Q. B. 442; *Baldwin v. London, Chatham and Dover Rail. Co.*, 9 Q. B. D. 582; *Welch, Perrin & Co. v. Anderson & Co.*, (C. A.) 61 L. J. Q. B. 167; Breach of covenant for quiet enjoyment, *Sutton v. Baillie*, 65 L. T. 528; Breach of covenant to repair, *Morgan v. Hardy*, 17 Q. B. D. 770; *Lombard v. Kennedy*, 23 L. R. Ir. 1; *Joyner v. Weekes*, [1891] 2 Q. B. 31; 60 L. J. Q. B. 510; *Henderson v. Thorn*, [1893] 2 Q. B. 164; Breach of covenant not to sub-let without consent, *Lepla v. Rogers*, [1893] 1 Q. B. 31; Waste, *Witham v. Kershaw*, 16 Q. B. D. 613; 54 L. T. 121; Wrongfully refusing to sign judgment debt, *Oddly v. Hallet*, 1 C. & E. 532; Under Lord Campbell's Act, *Grand Trunk Rail. Co. of Canada v. Jennings*, 13 App. Cas. 800; 58 L. J. P. C. 1; Under Employers' Liability Act, 1880, *Bortick or Bortick v. Head, Wrightson & Co.*, 53 L. T. 909; 34 W. R. 102; Bill of exchange, *Ex parte Roberts*, *In re Gillespie*, 16 Q. B. D. 702; 55 L. J. Q. B. 131 (affirmed by the Court of Appeal 35 W. R. 128); *In re Commercial Bank of South Australia* (No. 3), 36 Ch. D. 522; 57 L. T. 395; *In re The English Bank of the River Plate, Ex parte The Bank of Brazil*, 62 L. J. Ch. 578; Misleading conditions of sale, *Nash v. Wooderson*, 33 W. R. 301; 52 L. T. 49; Misdescription in conditions of sale, *In re Chifferiel*, *Chifferiel v. Watson* (No. 2), 40 Ch. D. 45; Detention of goods, *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66; 58 L. J. Ch. 758; [1892] A. C. 166; Detention of samples, *Schulze v. Great Eastern Rail. Co.*, 19 Q. B. D. 30; Injury by sewage farm, *Reg. v. Essex*, 17 Q. B. D. 447; 55 L. J. Q. B. 313; Trespass, *Reeves v. Penrose*, 26 L. R. Ir. 141; *McArthur v. Cornwall*, [1892] A. C. 75; 61 L. J. P. C. 1; 65 L. T. 718; Bailment, *Claridge v. South Staffordshire Tramway Co.*, 61 L. J. Q. B. 503; Non-delivery of cargo, *Smith, Edwards & Co. v. Tregarthen*, 56 L. J. Q. B. 437; 57 L. T. 58; *Rodocanachi v. Milburn*, 18 Q. B. D. 67; 56 L. J. Q. B. 202; Contract to finance a business,

Boize v. Edwards, W. N. (1889) 231; Costs, *Harrison v. McSheean*, W. N. (1885) 207; Cost of performance not the measure of damages in breach of contract, *Wigzell v. School for the Indigent Blind*, 8 Q. B. D. 357.

By 3 & 4 Will. 4, c. 42, s. 28, it is provided that "Upon all debts or sums certain, payable at a certain time or otherwise, the jury, on . . . an inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law"; and by sect. 29 of that Act "The jury on [*inter alia*] any inquisition of damages may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act."

Jury empowered to allow interest upon debts;

and in certain actions may give damages in the nature of interest.

By the R. of S. C. 1883, Ord. XXXVI., r. 58, "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of assessment"; and see on this Rule, *Read v. Wotton*, [1893] 2 Ch. 171.

Assessment of damages in continuing cause of action.

The jury have no power over costs. As to costs of inquiry, see *Kehrl v. Parker*, L. R. 10 Ch. 334; *Stack v. Midland Rail. Co.*, 50 L. J. Ch. 196; 16 Ch. D. 81; and *Jacobs v. London, Brighton, and South Coast Rail. Co.*, 22 L. T. 651.

Costs of inquiry.

An undersheriff, before whom damages are assessed in an action brought in the High Court under a judgment signed in default of pleading, has no power to certify for costs on the High Court scale under sect. 116 of the County Courts Act, 1888, such power being now under that section exercisable only by the High Court or a judge of the High Court. *Coe v. Hill*, 67 L. T. 26.

Return.

Return to be
made by
sheriff.

“When the jury have agreed upon the damages, the undersheriff fills up the inquisition, reads it to the jury, and signs it in the name of the sheriff, and the jury sign it opposite to their seals. This the sheriff keeps, and makes out another on parchment, sealed with his seal of office, and signed with the sheriff's name, and to this the seals of the jury are affixed, but they do not sign it. The inquisition on parchment is then annexed to the writ of inquiry and the return is endorsed on the back of the writ. ‘The execution of this writ appears in a certain inquisition hereunto annexed.’” 2nd ed. Wats. Sh. 328. Where the inquiry is executed by leave of the Court before a judge, the sheriff returns the inquisition as in other cases. The sheriff must return as to time and place of holding the inquiry when there are special directions in the writ as to any fixed time and place for holding it. Where a sheriff does not return in due time a writ of inquiry, the Court will compel him by rule to do so. *Stockdale v. Hansard*, 8 D. P. C. 296; 3 Jur. 1174.

Return where
sheriff and
jury in doubt.

If any doubt should have arisen, the sheriff may return that he and the jury were in doubt, and after stating wherein, may pray the advice of the Court. Dalt. Sh. 260. *Per* Cotton, L.J., in *Angell v. Baddeley*, 3 Ex. D. 49; 47 L. J. Ex. 86: “I think there must be a discretion in the Court as to whether or no the sheriff shall be ordered to make a return. . . . The point which weighs with me as to the right to a return is that I cannot see how the plaintiffs could be benefited by it”; and see *France v. Clarkson*, 2 D. P. C. 532, and R. of S. C. 1883, Ord. LII. r. 11.

Return of no
damages.

It is laid down that if the sheriff return that the inquest or jury found no damages, the sheriff is not to be held responsible for the default of the jury, for the sheriff is only liable for his own false or insufficient return, whereas here he returns it truly and sufficiently as circumstances permit. Bro. Retorne. 20; Fitz. Retorne. 66; 5 Rep. 32, 33; 2nd ed. Wats. Sh. 330.

Defect in
return.

A defect in the return does not vitiate the proceedings or affect the sheriff's jurisdiction. *Pippett v. Hearn*, 1 D. & R. 266; 5 B. & A. 634; see also *Bale v. Hodgetts*, 7 Moore, 602; 1 Bing. 182.

Form of Inquisition.

The following form of inquisition is that for the ordinary case of assessment of damages under a judgment, and can be readily adapted to cases of detainee and breaches.

Form of
inquisition

— } An inquisition indented, taken at in the said county
to wit. } of on the day of in the year of our Lord
one thousand eight hundred and before me sheriff of
the county aforesaid, by virtue of a writ of our said Lady the Queen
to me the said sheriff directed and to this inquisition annexed to
inquire of certain matters in the said writ specified by the oath of
 good and lawful men of my bailiwick, who being charged
and sworn upon their oath say that in the said writ named
hath sustained damages to on occasion of the premises in the
said writ mentioned besides his costs of suit in this behalf and for
those costs forty shillings (*h*).

In witness whereof as well I the said sheriff as the said jurors
have set our seals to this inquisition the day and year above
written (*h*).

Sheriff's Liability.

The liability of a sheriff to an attachment or to an action for
misconduct is the same on a writ of inquiry of damages as on
any other writ.

Subsequent Proceedings.

By sect. 18, 3 & 4 Will. 4, c. 42, "Upon the return of [*inter*
alia] a writ of inquiry, or a trial of issues, judgment may be
signed, and execution issue forthwith, unless the sheriff or his
deputy before whom such writ of inquiry may be executed, or
such sheriff's deputy, or judge, before whom such trial shall be
had, shall certify under his hand upon such writ that judgment
ought not to be signed until the defendant shall have had an
opportunity to apply to the Court for a new inquiry, or a judge
of any of the said Courts shall think fit to order that judgment
or execution shall be stayed till a day to be named in such order;

Staying
judgment
or execution.

(*h*) In the opinion of an eminent county undersheriff it is neither
obligatory nor customary for the inquisition to be signed by the under-
sheriff and jury, and the above words "and for those costs forty shillings,"
being the old form applicable to days when forty shillings carried costs,
are now inapplicable.

and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at *Nisi Prius*; and the sheriff or his deputy, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given to judges at *Nisi Prius*."

Form of Certificate to be indorsed on the Writ for Stay of Judgment.

I certify that in my opinion judgment ought not to be signed upon this writ until the within-named defendant shall have had an opportunity to apply to the to set aside the execution thereof.

Dated the day of A.D. 18 .

Sheriff or
Undersheriff.

As to staying execution of this writ, see *Stockdale v. Hansard*, 8 D. P. C. 296; 3 Jur. 1174.

Setting aside
inquisition.

As to setting aside an inquisition, see *Kingston v. Haychurch*, 1 Chit. 644; *Benson v. Frederick*, 3 Burr. 1845; *Lathbury v. Brown*, 10 Moore, 106; and *Grater v. Collard*, 6 D. P. C. 503.

Application
for new trial
and assess-
ment.

On an application for a new trial, the Court will not require the undersheriff to make an affidavit of circumstances which occurred at the inquiry. *Power v. Horton*, 3 Hodg. 14. And as to application to the Court of Appeal for a new trial and assessment, see *Radman's Microbe Killer Co. v. Leather*, [1892] 1 Q. B. 85; 61 L. J. Q. B. 38.

Fees.

As to the fees of the sheriff, &c. on a writ of inquiry, see under the title "Sheriffs' Fees," *post*, pp. 510, 513.

II. COMPENSATION COURT.

Introductory.

Compensation
to be given
where public
companies
acquire land
under com-

In the case of the acquisition of lands by public companies under their compulsory powers, statutory provision is made for their making compensation to the parties interested in such lands for the damage they may consequently sustain. Such

provisions are chiefly comprised in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), which is, moreover, incorporated with every Act whereby a public company is authorized to acquire land for its undertaking. But the Lands Clauses Consolidation Act, 1845, is applicable only where land is sought to be acquired for undertakings of a public nature. *Wale v. Westminster Palace Hotel Co.*, 8 C. B. N. S. 276; 7 Jur. N. S. 26. The general Acts which are to be regarded as respectively incorporated with and forming part of each of the various Acts relating to such undertakings, except as thereby expressly modified, are the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), the two latter of which Acts are more particularly applicable to the subject of compensation.

As regards the purchase of lands for the above purposes, otherwise than by agreement, it is enacted by the Lands Clauses Consolidation Act, 1845, sect. 16, that the capital is to be subscribed before compulsory powers are put in force, and by sect. 17, that a certificate of two justices is to be evidence that the capital has been subscribed.

By sect. 18, the promoters of the undertaking must give notice of their intention to take lands to all the parties interested in such lands, or to other the parties therein mentioned, "and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." By sects. 19 and 20 provision is made for the service of such notice on owners and occupiers of lands and on corporations aggregate.

By sect. 21, if the parties fail to treat or if they do not agree as to the amount of compensation to be paid, the amount of such compensation is to be settled in the manner provided below for settling cases of disputed compensation.

By sects. 22 and 24 provision is made for the settlement by two justices of disputes as to compensation where the amount claimed does not exceed 50*l.*; and see sect. 63 in connection therewith.

pulsory powers.

Capital to be subscribed before compulsory powers put in force.

Certificate of justices' evidence that capital subscribed.

Promoters to give notice of intention to take lands to parties interested.

Service of notice.

How question settled, if parties fail to treat or dispute.

Justices to settle disputes where amount claimed does not exceed £50.

Compensation exceeding £50 to be settled by arbitration or jury at option of claimant.

It is provided by sect. 23 that if the compensation claimed or offered exceeds 50%, and if the party claiming compensation desire to have the same settled by arbitration, it shall be so settled accordingly. But if such party fail to signify such desire to the promoters, or the arbitrators or umpire fail to make their or his award for three months, or no final award be made, the question of such compensation is to be settled by the verdict of a jury as hereinafter provided. To continue, by sect. 68, "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50%, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts." As to this section, see *Reg. v. Metropolitan Rail. Co.*, 8 L. T. 663; and *Reed v. Victoria and Pimlico Rail. Co.*, 1 H.

& C. 826; 32 L. J. Ex. 167. See also as to assessment by jury, *Abrahams v. London (Mayor, &c.)*, L. R. 6 Eq. 625; and *Starr v. London (Mayor, &c.)*, L. R. 7 Eq. 236.

By sects. 25 to 37, both inclusive, provision is made for the settlement by arbitration of questions of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be so settled, and see sect. 63 in connection therewith. Sect. 1 of the Lands Clauses (Umpire) Act, 1883 (46 & 47 Vict. c. 15) amends sect. 28 of the 1845 Act, and extends the power of appointment of umpire by the Board of Trade.

Settlement by arbitration of questions of disputed compensation.

By sects. 58 to 67 it is provided that compensation to absent parties is to be determined by the valuation of a surveyor to be appointed by two justices. The surveyor, before entering upon the duty of such valuation, must make and subscribe the declaration which is set out in sect. 60. All the expenses of the valuation must be borne by the promoters, and they must produce the valuation upon demand by the owner of the lands. If the owner is dissatisfied with it, he may have the question of compensation submitted to arbitration. If the arbitrators determine that the valuation was sufficient, the costs shall be in their discretion; but if a further sum is awarded, all the costs of the arbitration must be borne by the promoters, and they must pay or deposit such further sum awarded within fourteen days.

Compensation to absent parties, how to be determined.

By sect. 91, "If in any case in which according to the provisions of this or the special Act, or any Act incorporated therewith, the promoters of the undertaking are authorized to enter upon and take possession of any lands required for the purposes of the undertaking, the owner or occupier of any such lands or any other person refuse to give up the possession thereof, or hinder the promoters of the undertaking from entering upon or taking possession of the same, it shall be lawful for the promoters of the undertaking to issue their warrant to the sheriff to deliver possession of the same to the person appointed in such warrant to receive the same, and upon the receipt of such warrant the sheriff shall deliver possession of any such lands accordingly, and the costs accruing by reason of the issuing and execution of such warrant, to be settled by the sheriff, shall be paid by the person refusing to give possession, and the amount of such costs shall be deducted and retained by the promoters of the undertaking from the compensation, if any, then payable by them to such party, or if no such compensation

Proceedings in case of refusal to deliver possession of lands.

be payable to such party, or if the same be less than the amount of such costs, then such costs, or the excess thereof beyond such compensation, if not paid on demand, shall be levied by distress, and upon application to any justice for that purpose he shall issue his warrant accordingly." As to this section, see *Tiverton and North Devon Rail. Co. v. Loosemoor*, 9 App. Cas. 480; 53 L. J. Ch. 812.

Value of severed land and expense of making communication, how to be determined.

Of sects. 93 and 94, which relate to intersected lands, sect. 94 provides (*inter alia*) that "on the occasion of ascertaining the value of the land required to be taken for the purposes of the works, the jury or the arbitrators, as the case may be, shall, if required by either party, ascertain by their verdict or award the value of any such severed piece of land, and also what would be the expense of making such communication."

Compensation to lord of manor for enfranchisement of copyholds, how to be determined.

Of sects. 95 to 98 inclusive, which relate to copyhold lands, sect. 96 provides that the amount of compensation to be paid to the lord of the manor for enfranchisement is to be in case of dispute "determined as in other cases of disputed compensation; and in estimating such compensation the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost through the vesting of such copyhold or customary lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed for"; and as to copyhold property, see *Ecclesiastical Commissioners for England v. London and South Western Rail. Co.*, 23 L. J. C. P. 177; and *Lowther v. Caledonian Rail. Co.*, [1892] 1 Ch. 73; 61 L. J. Ch. 108.

Compensation in case of common lands, how to be determined.

Of sects. 99 to 107 inclusive, which relate to common lands, sect. 105 provides that disputes as to common lands are to be settled as in other cases, although by sect. 106, in the therein-mentioned events, the amount of compensation is to be determined by a surveyor to be appointed as therein mentioned; and in connection with these sections, see the Commonable Rights Compensation Act, 1882 (45 & 46 Vict. c. 15). See also as to claim for compensation by a copyholder in respect of common, *Austin v. Amhurst*, 7 Ch. D. 689.

Compensation in case of mortgaged lands, how to be determined.

Of sects. 108 to 114 inclusive, which relate to lands in mortgage, sect. 110 provides that when the mortgage exceeds the value of the lands, the compensation is to be, in case of disagreement, ascertained as in other cases of disputed compensation, and by sect. 112 there is a like provision for determining the sum to be paid in case of disagreement where part only of

the mortgaged lands is taken, whilst, by sect. 114, compensation is to be made in certain cases if the mortgage be paid off before the stipulated time.

Of sects. 119 to 123 inclusive, which relate to lands subject to leases, sect. 120 provides that the lessees mentioned in sect. 119 shall be entitled to compensation for any damage done to them in their tenancies "by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works," whilst by sect. 121, the amount of compensation payable to tenants for a year or from year to year is to be determined by two justices in case of disagreement. As to these sections, see *Ex parte Merrett*, 2 L. T. 471; *Reg. v. East London Rail. Co.*, 17 L. T. 291; *Reg. v. Great Northern Rail. Co.*, 2 Q. B. D. 151; 46 L. J. Q. B. 4; *Syers v. Metropolitan Board of Works*, 36 L. T. 277; *The Queen v. Stone*, L. R. 1 Q. B. 529; and *The Queen v. Vaughan and Metropolitan District Rail. Co.*, L. R. 4 Q. B. 190; and in connection with sect. 123, see 26 & 27 Vict. c. 92, Part II.

Of sects. 124 to 126 inclusive, relating to interests in lands which have by mistake been omitted to be purchased, sect. 125 provides that "in estimating the compensation to be given for any such last-mentioned lands, or any estate or interest in the same, or for any mesne profits thereof, the jury, or arbitrators, or justices, as the case may be, shall assess the same according to what they shall find to have been the value of such lands, estate or interest, and profits, at the time such lands were entered upon by the promoters of the undertaking, and without regard to any improvements or works made in the said lands by the promoters of the undertaking, and as though the works had not been constructed."

The Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106), relates only to purchases of land by agreement, except as to sect. 7, which empowers the Secretary for War to use the powers given to promoters by 8 & 9 Vict. c. 18. Such 1860 Act is, moreover, repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), as to boroughs within that Act.

By sect. 3 of the Lands Clauses Consolidation Acts Amendment Act, 1869 (32 & 33 Vict. c. 18), which is to be construed as one with the Lands Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, "Where any lands by the special Act authorized to be taken

Compensation in case of lands subject to leases, how to be determined.

Compensation in case of interests in lands omitted to be purchased, how to be determined.

Power of Secretary for War to use powers given to promoters under 8 & 9 Vict. c. 18.

High Bailiff substituted for sheriff in case of disputed compensation as to lands in Westminster.

are situate within the city and liberty of Westminster, then with respect to those lands, in every case in which any question of disputed compensation is required by 'The Lands Clauses Consolidation Act, 1845,' or any Act amending the same, to be determined by the verdict of a jury, the high bailiff of the city and liberty of Westminster, or his deputy, shall be deemed to be substituted for the sheriff throughout such of the enactments of 'The Lands Clauses Consolidation Act, 1845,' and any Act amending the same as relate to the reference to a jury."

Compensation
for lands
taken under
Railway
Clauses Con-
solidation
Act, how to
be deter-
mined.

The Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), sects. 6 to 24 inclusive relate to the construction of railways and works connected therewith. By sect. 6 it is provided that, "In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act or any Act incorporated therewith vested in the company; and except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last mentioned Act shall be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof." As to the operation of this section and also sect. 16 of the same Act, see *Knock v. Metropolitan Rail. Co.*, L. R. 4 C. P. 131.

Purchase-
money and
compensation
for lands
temporarily
occupied, how
to be deter-
mined.

Of sects. 30 to 44 of this Act, which relate to the temporary occupation of lands near the railway during the construction thereof, sect. 42 provides that owners of lands may compel the company to purchase lands so temporarily occupied, and sect. 44 provides that the amount and application of the purchase-money and other compensation payable by the company shall be determined in the manner provided by the Lands Clauses

Consolidation Act for determining the amount and application of the compensation to be paid for lands taken under the provisions thereof.

Of sects. 77 to 85 inclusive, which relate to mines lying under or near the railway, it is provided by sect. 78 that, in case of disagreement, the compensation shall be settled as in other cases of disputed compensation, and by sect. 81 that compensation for injury done to mines is to be, in case of disagreement, settled by arbitration. And as to compensation to mine owners, see *Whitehouse v. Wolverhampton and Walsall Rail. Co.*, L. R. 5 Ex. 6.

Compensation to owners of mines under or near railway, how to be determined.

By 13 & 14 Vict. c. 83, sects. 20 and 21 (extended and amplified by 30 & 31 Vict. c. 127, sect. 31), a landowner is entitled to compensation on abandonment of a railway after notice given to purchase, but the amount of such compensation is, in case of difference, to be settled by arbitration as therein provided (sect. 25).

Compensation for abandonment of railway after notice to purchase, how to be determined.

By the Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), sect. 20, "Where a railway is authorized to be constructed by a special Act passed either before or after the passing of this Act, and the time limited by the special Act for the exercise of powers of compulsory purchase of lands, or of powers for the construction of the railway and works, is extended by a special Act hereafter passed and incorporating this part of this Act, then and in every such case the justices, arbitrators, umpires or juries as the case may be, who award or assess the compensation to be made by the company to the owners or occupiers of, or other persons interested in, lands taken or used for the purposes of the railway and works, or injuriously affected by the construction thereof, shall, in estimating the amount of such compensation, have regard to, and assess compensation for, the additional damage (if any) sustained by those owners, occupiers, or other persons, by reason of the extension of time." But by sect. 21 such extension of time is not to affect existing contracts and notices as to lands under the Railway Clauses Acts.

Compensation for additional damage by extension of time, how to be determined.

By the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), sect. 41, the company may apply to a common law judge to hear cases of compensation under the Lands Clauses Consolidation Act, 1845, and by sect. 42 may obtain a judge's order instead of issuing a warrant to the sheriff. Sect. 43 provides that the verdict of the jury and judgment of the Court upon any issue authorized by that Act shall, as regards costs

Railway company may apply to judge to hear cases of compensation under 8 & 9 Vict. c. 18.

and every other matter incident to or consequent thereon, have the same operation and effect as if that verdict and judgment had been the verdict of a jury and judgment of a sheriff upon an inquiry conducted upon a warrant under the Lands Clauses Consolidation Act, 1845.

Basis for the
assessment of
compensation.

By the courteous permission of Mr. Cripps the following summary of the basis for the assessment of compensation has been taken from his work on the Law of Compensation:—
“The basis on which all compensation for lands required or taken should be assessed is their value to the owner as at the date of the notice to treat, and not their value when taken to the promoters. The question is not, what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him, and includes all loss in consequence of eviction from the lands. The value of lands to an owner is enhanced by the probability of a more profitable future use, and this element must be taken into consideration in the assessment of compensation. In assessing damage incurred consequent on the taking of lands under parliamentary powers, the ordinary principles of law as to remoteness of damage apply. Again, if the promoters are empowered to acquire, and do acquire, mines and minerals under the surface of the ground, their value must be ascertained and paid for on the same principles as apply to the surface lands, and [referring to the promoter’s rights to adjacent and subjacent support in reference to the acquired surface land] if the nature of the works, for the purposes of which surface lands are taken, is such as to impose more than the customary restrictions on the working of minerals by the owner, and thereby to diminish the value to him of his interest in the mines, the assessment of the value of the lands should include the loss to the owner from the diminution of the value of his interest in the mines situate under the lands taken.”

Meaning of
expressions—

According to the interpretation clauses of the Lands Clauses Consolidation Act, 1845 (sects. 2 and 3), the following words and expressions, both in that Act and the special Act, shall have the meanings mentioned, unless there be something either in the subject or context repugnant to such construction, viz.:—the
“the sheriff,” word “sheriff” shall include undersheriff, or other legally competent deputy; and where any matter in relation to any lands is required to be done by any sheriff, or by any clerk of the peace, the expression “the sheriff,” or the expression “the
“the clerk of
the peace,”

clerk of the peace," shall in such case be construed to mean the sheriff or the clerk of the peace of the county, borough, city, liberty, cinque port, or place where such land shall be situate; and if the lands in question, being the property of one and the same party, be situate not wholly in one county, borough, city, liberty, cinque port, or place, the same expression shall be construed to mean the sheriff or clerk of the peace of any county, borough, city, liberty, cinque port, or place where any part of such lands shall be situate, and "the word 'lands' shall extend to messu-
"lands,"
and
 ages, lands, tenements and hereditaments, of any tenure"; whilst "the word 'county' shall include any riding or other
"county."
 like division of a county, and shall also include county of a city or county of a town."

Warrant to Summon Jury and Hold Inquiry.

By sect. 38 of the Lands Clauses Consolidation Act, 1845, "Before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned (i), and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damages to be sustained by him by the execution of the works." On this section see *Railstone v. York, Newcastle, and Berwick Rail. Co.*, 13 Q. B. 404; 19 L. J. Q. B. 464 (as governed by *Richardson v. South Eastern Rail. Co.*, 11 C. B. 154); and, in particular, as regards the sheriff, see *Horrocks v. Metropolitan Rail. Co.*, 19 C. B. N. S. 139. See also *Balls v. Metropolitan Board of Works*, L. R. 1 Q. B. 337; 35 L. J. Q. B. 101; *Hayward v. Metropolitan Rail. Co.*, 33 L. J. Q. B. 73; *Reg. v. Menley-Smith*, 67 L. T. 197; 40 W. R. 333; and *Thompson v. Tottenham and Forest Gate Rail. Co.*, 67 L. T. 416.

Promoters of undertaking to give notice before issuing warrant to summon jury.

By sect. 39, "In every case in which any such question of
Warrant for summoning

(i) i.e., if no application be made for a trial at *Nisi Prius* under 31 & 32 Vict. c. 119.

jury to be
addressed to
the sheriff;

but if sheriff
be interested,
then to
coroner.

disputed compensation shall be required to be determined by the verdict of a jury, the promoters of the undertaking shall issue their warrant to the sheriff requiring him to summon a jury for that purpose, and such warrant shall be under the common seal of the promoters of the undertaking, if they be a corporation, or if they be not a corporation under the hands and seals of such promoters or any two of them; and if such sheriff be interested in the matter in dispute, such application shall be made to some coroner of the county in which the lands in question, or some part thereof, shall be situate; and if all the coroners of such county be so interested such application may be made to some person having filled the office of sheriff or coroner in such county, and who shall be then living there, and who shall not be interested in the matter in dispute; and with respect to the persons last mentioned, preference shall be given to one who shall have most recently served either of the said offices; and every ex-sheriff, coroner, or ex-corporer shall have power, if he think fit, to appoint a deputy or assessor." The above-mentioned disqualifying interest of the sheriff must, like that which at common law disqualifies an officer from acting in a judicial inquiry, be direct and certain, and not merely remote or contingent. *The Queen v. The Manchester, Sheffield, and Lincolnshire Rail. Co.*, L. R. 2 Q. B. 336; and see *Ex parte Baddeley*, 5 D. & L. 575; 5 Rail. Cas. 542; *Worsley v. South Devon Rail. Co.*, 16 Q. B. 539; 20 L. J. Q. B. 254; *Rex v. Sheriff of Warwickshire*, 24 L. T. 211; 2 Rail. Cas. 661; *Corrigal v. London and Blackwall Rail. Co.*, 5 M. & G. 219; and *Reg. v. London and North Western Rail. Co.*, 9 L. T. 423.

Provisions
applicable to
sheriff to
apply to
coroner.

By sect. 40, "Throughout the enactments contained in this Act relating to the reference to a jury, where the term 'sheriff' is used, the provisions applicable thereto shall be held to apply to every coroner or other person lawfully acting in his place; and in every case in which any such warrant shall have been directed to any other person than the sheriff, such sheriff shall immediately on receiving notice of the delivery of the warrant, deliver over, on application for that purpose, to the person to whom the same shall have been directed, or to any person appointed by him to receive the same, the jurors' book and special jurors' list belonging to the county where the lands in question shall be situate."

Payment of
coroner when
acting for
sheriff.

As to payment of coroners when they act for sheriffs, see the Coroners Act, 1887 (50 & 51 Viet. c. 71), sect. 15.

The following is a form of the warrant addressed to the sheriff by the promoters requiring him to summon a jury :—

Form of
warrant to
sheriff.

Form of Warrant to Sheriff.

— } Whereas we the promoters, &c. on the day of
to wit. } A.D. 18 pursuant to the statute in such case made and pro-
vided did cause to be served a certain notice in writing under our
common seal personally upon which said notice was and is
in the words and figures following [*Here set out the notice*]. And
whereas the said hath not accepted the offer therein contained
or any part thereof and the question of value and compensation still
remains disputed between us: We do hereby require and command
you upon the receipt of this our warrant to summon a jury to deter-
mine the said differences and disputes in the premises and herein
fail not. Given under our common seal, &c.

Summoning Jury.

By sect. 41, “Upon the receipt of such warrant the sheriff shall summon a jury of twenty-four indifferent persons, duly qualified to act as common jurymen in the superior Courts, to meet at a convenient time and place to be appointed by him for that purpose, such time not being less than fourteen nor more than twenty-one days after the receipt of such warrant, and such place not being more than eight miles distant from the lands in question, unless by consent of the parties interested, and he shall forthwith give notice to the promoters of the works of the time and place so appointed by him.” See hereon *Reg. v. Sheriff of Middlesex*, 3 G. & D. 549; *S. C. nom. Walker v. London and Blackwall Rail. Co.*, 3 Q. B. 744; as also sects. 18 and 38 of the *Sheriffs Act, 1887* (50 & 51 Viet. c. 55), under sub-title “Writ of Inquiry,” *ante*, p. 407.

Jury to be
summoned.

The following is a form of the summons to the jury mentioned in the above section :—

Form of
summons to
jury.

Form of Jury Summons.

— } Pursuant to the provisions of “The Juries Act, 1862,”
to wit. } and of “The Lands Clauses Consolidation Act, 1845,” and
in execution of a warrant under the hands and seals of two of the
undertakers of the in of the county of to me
directed, I hereby summon you to be and appear before me at a
Court to be held at in in the of on ,
the day of , at of the clock in the noon, to
serve on a special [*or common*] jury and inquire of and assess the
compensation to be paid by the said undertakers to of ,

for the purchase of land at _____, in the _____ of _____, in the _____ of _____, and for the damage that may be sustained by him by reason of the works authorised by the Company's Acts.

Given under the seal of my office, at _____, this _____ day of _____, 18 ____.

Esquire,
Sheriff.

NOTICE.

By "The Lands Clauses Consolidation Act, 1845," it is enacted (sect. 14) that if any person summoned and returned upon any jury under this or the special Act, whether common or special, do not appear, or, if appearing he refuse to make oath, or in any other manner unlawfully neglect his duty, he shall, unless he show reasonable excuse to the satisfaction of the sheriff, forfeit a sum not exceeding ten pounds. And in addition to the penalty hereby imposed, every such juryman shall be subject to the same regulations, pains, and penalties, as if such juryman had been returned for the trial of an issue joined in any of the superior Courts.

If you are a shareholder in the company, or otherwise interested in the case, you will be disqualified from serving, and should at once inform Mr. _____, Undersheriff, _____, of the fact.

Special jury
to be sum-
moned at the
request of
either party.

By sect. 24, "If either party desire any such question of disputed compensation as aforesaid to be tried before a special jury, such question shall be so tried, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant to the sheriff; and for that purpose the promoters of the undertaking shall by their warrant to the sheriff require him to nominate a special jury for such trial; and thereupon the sheriff shall, as soon as conveniently may be after the receipt by him of such warrant, summon both the parties to appear before him, by themselves or their attornies, at some convenient time and place appointed by him, for the purpose of nominating a special jury (not being less than five nor more than eight days from the service of such summons); and at the place and time so appointed the sheriff shall proceed to nominate and strike a special jury, in the manner in which such juries shall be required by the laws for the time being in force to be nominated or struck by the proper officers of the superior Courts, and the sheriff shall appoint a day, not later than the eighth day after striking of such jury, for the parties or their agents to appear before him to reduce the number of such jury, and thereof shall give four days' notice to the parties; and on the day so appointed the sheriff shall proceed to reduce the said special

jury to the number of twenty in the manner used and accustomed by the proper officers of the superior Courts." It appears that this method of summoning special jurors still prevails in the compensation Court, though not in the case of writs of inquiry.

The following is a form of the summons which the sheriff issues to the parties in connection with his nomination of a special jury under the above section :—

Form of
summons by
sheriff to
parties in
connection
with nomi-
nation of
special jury.

— } Pursuant to the provisions of the Lands Clauses Con-
to wit. } solidation Act, 1845, and in execution of a warrant under
the Common Seal of the requiring me to nominate and
summon a special jury to determine by their verdict the amount
of the purchase money and compensation to be paid by them
to for the purchase of certain lands and hereditaments situate
at in the of , and for the damage to be sustained
by the said by reason of the exercise of certain Acts of Parlia-
ment in the said warrant mentioned, I do hereby summon you to
appear before me by yourselves or your attorneys on the
day of at of the clock at the office of my undersheriff,
situate at in , in the of , for the purpose of
nominating a special jury, at which time and place I shall proceed
to nominate and strike a special jury in the manner in which such
juries are by law required to be nominated and struck by the proper
officers of the superior Courts.

And I give you notice that I appoint the day of
at of the clock at the office of my undersheriff aforesaid,
for you to appear before me to reduce the number of such special
jury, at which time and place I shall proceed to reduce the said
special jury to the number of twenty in the manner used and
accustomed by the proper officers of the superior Courts.

Dated this day of 18 .

Sheriff of .

Subject to the above-mentioned statutory provisions, the same remarks as to the qualification, &c. of jurors, in the case of an inquiry under a writ of inquiry, apply, *mutatis mutandis*, to an inquiry under the Lands Clauses Consolidation Act, 1845, as to which see *ante*, p. 408.

Qualification,
&c. of jurors.

By sect. 57, "No jurymen shall without his consent, be summoned or required to attend any such proceeding as aforesaid more than once in any year." But see *Walker v. London and Blackwall Rail. Co.*, 3 Q. B. 744; 12 L. J. Q. B. 88.

Jurymen not
to attend more
than once a
year.

By sect. 44 it is provided that if any person summoned and returned upon any jury under this or any special Act, whether common or special, do not appear, &c., he shall, unless he show reasonable excuse to the satisfaction of the sheriff, forfeit a sum not exceeding ten pounds. See this section fully set out, *post*, p. 433.

Penalty on
juror for non-
appearance to
summons, &c.

Inquiry and Verdict.

Promoters to give notice of time, &c. of inquiry to other party.

By sect. 46 of the Lands Clauses Consolidation Act, 1845, "Not less than ten days' notice of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party."

Jury to be impanelled.

By sect. 42, "Out of the jurors appearing upon such summons (see *ante*, p. 429) a jury of twelve persons shall be drawn by the sheriff, in such manner as juries for trials of issues joined in the superior Courts are by law required to be drawn, and if a sufficient number of jurymen do not appear in obedience to such summons, the sheriff shall return other indifferent men, duly qualified as aforesaid of the bystanders, or others that can be speedily procured to make up the jury to the number aforesaid, and all parties concerned may have their lawful challenges against any of the jurymen, but no such party shall challenge the array."

Deficiency of special jurymen, how to be filled up.

By sect. 55, "The special jury on such inquiry shall consist of twelve of the said twenty who shall first appear on the names being called over, the parties having their lawful challenges against any of the said jurymen; and if a full jury do not appear, or if after such challenges a full jury do not remain, then, upon the application of either party, the sheriff shall add to the list of such jury the names of any other disinterested persons qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the Court or can speedily be procured, so as to complete such jury, all parties having their lawful challenges against such persons; and the sheriff shall proceed to the trial and adjudication of the matters in question by such jury, and such trial shall be attended in all respects with the like incidents and consequences, and the like penalties shall be applicable, as hereinbefore (*k*) provided in the case of a trial by common jury."

Same special jury may try other inquiries by consent.

By sect. 56, "Any other inquiry than that for the trial of which such special jury may have been struck and reduced as aforesaid may be tried by such jury, provided the parties thereto respectively shall give their consent to such trial."

Jury and witnesses to be sworn.

By sect. 48, "Before the jury proceed to inquire of and assess the compensation or damage in respect of which their verdict is

(*k*) For purposes of transposition of sections read this "hereinafter."

to be given, they shall make oath that they will truly and faithfully inquire of and assess such compensation or damage, and the sheriff shall administer such oaths, as well as the oaths of all persons called upon to give evidence."

By sect. 43, "The sheriff shall preside on the said inquiry, and the party claiming compensation shall be deemed the plaintiff, and shall have all such rights and privileges as the plaintiff is entitled to in the trial of actions at law (1); and, if either party so request in writing, the sheriff shall summon before him any person considered necessary to be examined as a witness touching the matters in question, and on the like request the sheriff shall order the jury, or any six or more of them, to view the place or matter in controversy, in like manner as views may be had in the trial of actions in the superior Courts."

Sheriff to
preside and
summon
witnesses.

Form of Summons to Witness.

County of) Sheriff of the said county, to greeting: By
— to wit.) virtue and under the provisions of "The Lands Clauses
Consolidation Act, 1845," and in execution of a warrant under the
to me directed and delivered, I do hereby summon and require
you to be and appear before me on the day of at
of the clock in the noon of the same day at in
the county of , and there to attend day by day until you be
discharged and then and there to testify the truth according to your
knowledge touching certain matters then and there to be inquired
of between and the said and also that you bring with
you and produce at the time and place aforesaid . And in
case you make default in appearing at the time and place aforesaid,
you will forfeit the penalty imposed by the said Act.
Given under the seal of my office the day of one
thousand eight hundred and .

Form of
summons to
witness.

By sect. 44, "If the sheriff make default in any of the matters hereinbefore required to be done by him in relation to any such trial of inquiry he shall forfeit fifty pounds for every such offence, and such penalty shall be recoverable by the promoters of the undertaking by action in any of the superior Courts; and if any person summoned and returned upon any jury under this or the special Act, whether common or special, do not appear, or if appearing he refuse to make oath, or in any other manner unlawfully neglect his duty, he shall, unless he show reasonable excuse to the satisfaction of the sheriff, forfeit a sum not exceeding ten pounds; and every such penalty payable by a

Penalty on
sheriff and
jury for
default.

(1) Except, it seems, with regard to costs.

sheriff or juryman shall be applied in satisfaction of the costs of the inquiry, so far as the same will extend; and in addition to the penalty hereby imposed every such juryman shall be subject to the same regulations, pains and penalties as if such jury had been returned for the trial of an issue joined in any of the superior Courts."

Penalty on witnesses for default.

By sect. 45, "If any person duly summoned to give evidence upon any such inquiry, and to whom a tender of his reasonable expenses shall have been made, fail to appear at the time and place specified in the summons, without sufficient cause, or if any person, whether summoned or not, who shall appear as a witness, refuse to be examined on oath touching the subject-matter in question, every person so offending shall forfeit to the party aggrieved a sum not exceeding ten pounds."

Inquiry not to proceed if party claiming compensation makes default.

By sect. 47, "If the party claiming compensation shall not appear at the time appointed for the inquiry, such inquiry shall not be further proceeded in, but the compensation to be paid shall be such as shall be ascertained by a surveyor appointed by two justices in manner hereinafter provided." As to the mode in which compensation to absent parties is determined, see *ante*, p. 421.

Extent of jurisdiction of jury.

With regard to the jurisdiction of the jury, it was held in *Horrocks v. Metropolitan Rail. Co.*, 32 L. J. Q. B. 367; 8 L. T. 663; and *Reg. v. London and North Western Rail. Co.*, 23 L. J. Q. B. 185, that a jury, summoned to assess the compensation due to the claimant for lands injuriously affected by the works of a public company, has no jurisdiction to determine whether the lands have been injuriously affected, and that their jurisdiction is limited to assessing the amount of compensation; whilst in *Ex parte Cooper, In re North London Rail. Co.*, 34 L. J. Ch. 373; 11 Jur. N. S. 103, it was held that a jury cannot determine what interest a claimant has, but can only determine the value of the interest he claims. Nor can a jury determine whether a claimant really has the interest he claims; but its function is simply to assess the damages, assuming the interest being as claimed. *Brandon v. Brandon*, 34 L. J. Ch. 333; and see on this subject *Reg. v. Great Northern Rail. Co.*, 14 Q. B. 25; 19 L. J. Q. B. 25; *Reg. v. Lancaster and Preston Junction Rail. Co.*, 6 Q. B. 759; 14 L. J. Q. B. 84; *Reg. v. South Wales Rail. Co.*, 13 Q. B. 988; 18 L. J. Q. B. 310; *Reg. v. Sheriff of Middlesex*, 3 G. & D. 549; *S. C. nom. Walker v. London and Blackwall Rail. Co.*, 3 Q. B. 744; 12 L. J. Q. B. 88; and

Essex v. Acton Local Board, 14 App. Cas. 153; 58 L. J. Q. B. 594.

By sect. 49, "Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which under the provisions herein contained he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith." On this section see *Caledonian Rail. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229; *Corregal v. London and Blackwall Rail. Co.*, 3 Rail. Cas. 411; 12 L. J. C. P. 209; and *Essex v. Acton Local Board*, 14 App. Cas. 153; 58 L. J. Q. B. 594.

By sect. 50, "The sheriff before whom such inquiry shall be held shall give judgment for the purchase-money or compensation assessed by such jury; and the verdict and judgment shall be signed by the sheriff, and being so signed shall be kept by the clerk of the peace among the records of the general or quarter sessions of the county in which the lands or any part thereof shall be situate in respect of which such purchase-money or compensation shall have been awarded; and such verdicts and judgments shall be deemed records, and the same or true copies thereof shall be good evidence in all courts and elsewhere; and all persons may inspect the said verdicts and judgments, and may have copies thereof or extracts therefrom, on paying for each inspection thereof one shilling, and for every one hundred words copied or extracted therefrom sixpence, which copies or extracts the clerk of the peace is hereby required to make out, and to sign and certify the same to be true copies."

As to the admissibility of evidence, it may be well to note that questions are not infrequently asked of witnesses when giving their evidence in chief, or that such witnesses volunteer evidence, as to the prices given by the promoters, or received by others, for land or by way of compensation for damage to land in the neighbourhood or elsewhere. On this point a strict rule

Sums to be paid for purchase of lands and for damage to be assessed separately.

Verdict and judgment to be recorded.

How far evidence as to prices given by promoters for other lands admissible.

should be observed that no evidence of this character should be admitted in chief, but that it should be admitted in cross-examination.

Inquisition
not conclusive
evidence of
plaintiff's
right to com-
pensation ;

In an action on a verdict and judgment obtained in an inquisition before a sheriff's jury under the 68th section of the Lands Clauses Consolidation Act, 1845, the inquisition is not conclusive evidence that the plaintiff is entitled to compensation. *Chapman v. Monmouthshire Rail. and Canal Co.*, 2 H. & N. 267.

nor that lands
were damaged
and injuri-
ously affected.

It was, moreover, held in *Read v. Victoria and Pimlico Rail. Co.*, 32 L. J. Ex. 167, that the assessment of damages by the verdict of a jury under the Lands Clauses Consolidation Act, 1845, in respect of lands injuriously affected by public works, is not conclusive evidence that the lands were damaged and injuriously affected ; and, therefore, in an action upon such verdict and the judgment thereon to recover the damages awarded and costs, the defendants are not estopped from pleading that the lands and the plaintiff's interest therein were not damaged and injuriously affected, but that where the damages claimed and awarded exceed 50*l.*, the defendants are estopped from denying that the plaintiff was entitled to compensation to an amount exceeding 50*l.*

Defects in
inquisition.

An inquisition is not defective for omitting to show a previous dispute or non-agreement between the parties, inasmuch as the warrant and inquisition, which are to be taken together, afford the necessary indication of this ; nor is it defective for omitting to state that the requisite notices had been served on the plaintiff, an inquisition not being defective for the omission of a fact, the truth of which could not have been judicially known by the party taking the inquisition, and notices, being only made necessary by way of proviso in the Act, need not be alleged in the inquisition. *Taylor v. Clemson*, 8 Jur. 833. But a defect in the inquisition cannot be remedied by subsequent proceedings. *Rex v. Norwich and Watton Trustees*, 1 N. & P. 32 ; 2 H. & W. 385.

Quashing
inquisition.

As to quashing an inquisition before the sheriff, see *The Queen v. Sheward*, 5 Q. B. D. 179 ; and *Streatham and General Estates Co. v. Commissioners of Public Works, Ex parte Phillips*, 52 J. P. 615. See also *In re Chelsea Waterworks Co.*, 10 Ex. 731 ; 24 L. J. Ex. 79 ; *Reg. v. Halifax Board of Health*, 14 L. T. 447 ; and *Penny v. South Eastern Rail. Co.*, 26 L. J. Q. B. 225.

Sheriff's
authority to
proceed where

As to the sheriff's authority and obligation to proceed under the original warrant where the verdict has been set aside by

the order of a superior Court, see *Horrocks v. Metropolitan Rail. Co.*, 19 C. B. N. S. 139; and *Tanner v. Swindon, &c. Rail. Co.*, 45 L. T. 209. verdict set aside by Court.

By sect. 51 of the Lands Clauses Consolidation Act, 1845, Costs of inquiry, how to be borne.
 “On every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one-half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry, and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry.”

Sect. 52 provides for the costs being, in cases of difference and on application of either party, settled by one of the masters of the Queen’s Bench of England, or Ireland, according as the lands are situated, “and such costs shall include all reasonable costs, charges, and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry.” See 31 & 32 Vict. c. 119, sect. 145, as to fees of masters for settling costs of proceedings for determining questions of disputed compensation. Costs, in case of difference, to be settled by a master.

Sect. 53 provides for the payment of costs.

And see as to costs under the Lands Clauses Consolidation Act, 1845, the following cases :—*Walker v. London & Blackwall Rail. Co.*, 7 Jur. 1154; *Charlton v. Rolleston*, 28 Ch. D. 237; and *In re an Arbitration between Holliday and Mayor of Wakefield*, 20 Q. B. D. 699; 57 L. J. Q. B. 620. Payment of costs.

Fees.

As to the fees of the sheriff, &c. for assessing damages under the Lands Clauses Consolidation Act, 1845, see *post*, pp. 510, 514, under title "Sheriffs' Fees, &c."

III. INQUIRY UNDER LUNACY COMMISSION.

On this subject see the Lunacy Act, 1890 (53 Vict. c. 5), Part III., sects. 90—100, as qualified by the Lunacy Act, 1891 (54 & 55 Vict. c. 65), sect. 26, and Schedule; the Rules in Lunacy, 1892; and generally under the sub-title "Writ of Inquiry (Summoning Jury)," *ante*, p. 408. The sheriff's duties in this case are confined to summoning a jury where the return of a jury is directed. It seems customary to pay the jurors on a lunacy inquisition a fee of 1s. each.

IV. INQUIRY UNDER COMMISSION OF SEWERS.

On this subject see 3 & 4 Will. 4, c. 22, ss. 11 and 12, as partially repealed, as to sect. 12, by the Statute Law Revision Act, 1890 (53 & 54 Vict. c. 33), and generally under the sub-title "Writ of Inquiry (Summoning Jury)," *ante*, p. 408. It will be observed that in this case, also, the sheriff's duties are confined to summoning a jury, and the customary fee of the jury is 1s. each.

CHAPTER XXVIII.

ASSIZES AND SESSIONS.

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Introductory.

Assizes.

THE counties and counties of cities and towns of England and Wales (with the exception of London and Middlesex) are divided into certain circuits of the judges. Judges of the Queen's Bench Division, under commissions of assize, oyer and terminer and gaol delivery, go round these circuits three times a year, usually commencing, according to the Order in Council as to circuits of the 28th July, 1893, in January or February, May, June, or July, and October or November, and hold the winter, summer, and autumn assizes. At the winter and summer assizes both civil and criminal cases are tried, but at the autumn assizes only criminal business is taken, except at Manchester, Liverpool, Leeds, and Swansea, where the court also sits for civil business. There is also an additional circuit, called the Easter Circuit, held during April and May, during which spring assizes are held at Manchester, Liverpool, and Leeds only, civil and criminal business being taken at Manchester and Liverpool and criminal business only at Leeds. For further information as to the dates and places at which the assizes are held, see the Order in Council as to Circuits of the 28th July, 1893, and the Schedule thereto, W. N. (1893), p. 361.

Assizes, when
and where
held.

With a view to provide for the more speedy trial of prisoners awaiting trial in counties in which it is not usual to hold winter and spring assizes owing to such prisoners being too few in number, provision is made by the Winter Assizes Acts, 1876 and 1877 (39 & 40 Vict. c. 57, and 40 & 41 Vict. c. 46), and the Spring Assizes Act, 1879 (42 & 43 Vict. c. 1), for uniting any county for the purpose of winter or spring assizes with any neighbouring county or counties, and for extending to neighbouring counties the jurisdiction of the justices and judges of the Central Criminal Court at any session of oyer and terminer and gaol delivery for the Central Criminal Court district in the months of September, October, November, December, or January. Nothing, however, in the above Acts is to affect the custom of holding separate assizes in and for each county twice a year (42 & 43 Vict. c. 1, s. 3). The following expressions in these Acts have the following meanings, viz.:—
“Winter assizes” means any court of assize, or any session

Power by
Order in
Council to
unite counties
for purpose of
assizes.

of oyer and terminer or gaol delivery held in the months of September, October, November, December, or January; "spring assizes" means any such courts held in the months of March, April, and May; and "county" includes any county of a city or county of a town, and any such division of any county as is constituted by Order in Council under the Act 3 & 4 Will. 4, c. 71, as partially repealed by the Statute Law Revision Act, 1890 (53 & 54 Vict. c. 33); and the sheriff of a county so divided shall, for the above purposes, be deemed to be the sheriff for such division of a county. Moreover, for all the purposes of the holding of the winter and spring assizes the counties so united shall, subject to the provisions of the Order in Council providing for such union, be deemed to be one county, and the winter and spring assizes held in and for such united county shall be deemed to be held in and for each of the constituent counties.

"Court of Assize" includes Central Criminal Court.

The expression "court of assize" in any Act includes the Central Criminal Court. (Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 13 (4)).

Sessions.

Sessions, when and how often held.

Quarter sessions of the peace for counties are held four times each year, viz. :—Epiphany, Easter, Midsummer, and Michaelmas; but they may be held oftener by adjournment. Quarter sessions in boroughs having grants of quarter sessions must be held once in every quarter of a year, or oftener, if the recorder thinks fit, or the Secretary of State directs. (Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 165.)

Heads of the Undersheriff's Duties.

At Assizes.

Duties at assizes.

The following are the principal duties of the undersheriff at assizes, viz. :—

- (1.) On the sheriff's receipt of the precepts issued by the judges of assize and the clerk of assize directing him to summon the requisite juries, the undersheriff must

publish in the local newspapers the holding of the assizes in question (*a*).

- (2.) The undersheriff must then prepare and serve the requisite grand, special, and common jury summonses on the persons and in the mode and at the time hereinafter specified, and in connection therewith select a foreman of grand jury (*b*). In the case of gaol deliveries only grand and common jurors are, of course, required.
- (3.) He must thereupon provide printed copies of the panels, or lists of selected jurors, for the persons and purposes hereinafter mentioned, and prepare the sheriff's return to the above precepts.
- (4.)—(a.) All requisite arrangements must be made by the undersheriff for the judges' arrival in the town, including the providing of a proper retinue, &c., and their reception (*c*) at their lodgings (*d*), for the opening of commission and the judges' attendance at church, if desired, on Commission Day and Assize Sunday (if any), and he must, along with the sheriff and other officials, attend on the judges on these respective occasions.
- (b.) At the opening of the commission the undersheriff must provide for the sheriff personally handing to the presiding judge the above-mentioned return to the precept, to which are annexed the various panels hereinafter mentioned, and he must attend the church service (if any).
- (c.) Each morning of assize the undersheriff must attend with the sheriff in the latter's carriage at the judges' lodgings to take them to the Courts. He must be in attendance there throughout the day to look after the juries, to maintain order in the Courts, and to provide for the judges' general requirements. Referring to

(*a*) The sheriff also publishes a list of the prisoners committed for trial, but only where there is a combined county for assize, as to which see *post*, p. 446.

(*b*) In some counties it is customary for the high sheriff to provide for the attendance of the grand jury, which he does by letter, as to which see *post*, p. 456.

(*c*) There is no reception of the judges at the Central Criminal Court.

(*d*) It seems that it is no part of the sheriff's duties in Ireland to arrange for the judges' lodgings, as this is provided for by the Crown solicitor. But it is clearly always the sheriff's duty to see that the judges' lodgings are in good order, and all the domestic arrangements satisfactory.

the juries, it is always desirable that the undersheriff, or a competent deputy, should be present in Court when the names of the jury, grand and petty, are called over in case any question should arise upon the summonses or excuses sent by jurors for non-attendance. As to insuring quietness in the Courts, the judges always hold the undersheriff responsible for any noise, and whilst the police actually keep order in Court, they must obey the orders of the undersheriff, and are under his control.

- (d.) The undersheriff must similarly escort the judges to their lodgings at the close of each day, attend the church service on Assize Sunday (if any), and on the termination of the assize business, provide for the judges' departure.

At Sessions.

Duties at
county quar-
ter sessions.

The following are the principal duties of the undersheriff at county quarter sessions, viz. :—

- (1.) It is the duty of a county undersheriff to summon the requisite grand and common jurors, for which purpose the clerk of the peace forwards to him a precept, signed as a rule by at least three of the county magistrates about a month before the quarter sessions. (For a suitable form of jury summons, see *post*, p. 464.) The statutory provisions relating to grand and common juries, return to precept, &c., at assizes are equally applicable to the summoning, &c. of like jurors for quarter sessions. See, moreover, such of these provisions as specially refer to quarter sessions.
- (2.) The undersheriff must attend the quarter sessions for delivery to the clerk of the peace of the return to the above-mentioned precept. Moreover, he or reliable deputies ought to be present to look after the jurors. It is apparently not customary, however, for the high sheriff to attend (*e*).

Duties at
borough
quarter
sessions.

In the case of borough quarter sessions no actual duties devolve on the undersheriff, the duty of summoning the jurors, &c., resting with the clerk of the peace. (See the Municipal

[*e*] In Middlesex the Court is attended by the summoning officer.

Corporations Act, 1882, 45 & 46 Vict. c. 50.) It is, however, customary in some places for the sheriff and undersheriff, with the mayor and town clerk, as a matter of courtesy, to attend the recorder on the bench during a portion of each day (*f*).

Precept and Publication of Assize.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sect. 105, "The precept issued by the judges of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes; and the jurors shall thereupon be summoned in like manner as at present."

Precept by judges of assize to summon jurors for civil as well as criminal trials,

By sect. 108, "The precept issued by the judges of assize shall direct the sheriff to summon a sufficient number of special jurymen, to be mentioned therein, not exceeding forty-eight in all, to try the special jury causes at the assizes; and the persons summoned in pursuance of such precept shall be the jury for trying the special jury causes at the assizes, subject to such right of challenge as the parties are now by law entitled to."

and special jurors to try special jury causes at assizes.

The following is a suitable form of the above-mentioned notice of assize, viz. :—

Form of publication of assize.

Assizes, 18 .

Notice is hereby given that the Commission of Assize and General Gaol Delivery for the will be opened at the on day the day of 18 before the Honourable Sir , Knight, one of the Judges of her Majesty's High Court of Justice, Justice to our said Lady the Queen (*g*), when all justices of the peace, mayors, coroners, escheators, stewards, chief constables, and bailiffs of hundreds and liberties within the said county, and all jurors, persons bound by recognizances, witnesses and others having business are required to attend.

Jurymen not attending will be fined, unless some reasonable

(*f*) The duties of the Secondary of the City of London in relation to the Mayor's Court, the City of London Court, the Courts of Aldermen, and the Courts of Common Council are outside the scope of this work.

(*g*) One or two judges attend the assizes, according to the place where they are held, particulars of which an undersheriff should obtain from his London agent.

excuse be proved by oath or affidavit as required by Act 6 Geo. 4, cap. 50, s. 38.

——— Esquire,
High Sheriff [*or* Sheriff].

Sheriff's Office,
Street,
18 .

[*In some places it seems usual to add the following to the Notice of Assize, viz.: "N.B.—Magistrates' clerks are requested to forward depositions as early as possible to Esq., Clerk of Assize to whom all communications relative to criminal business should be addressed."*]

Form of
notification
of prisoners
for trial in
case of com-
bined county.

In the case of a combined county for assize (as to which, however, see *ante*, p. 441), a list of the prisoners removed for trial should be concurrently published. This list the under-sheriff obtains from the local prison authorities. The following is a suitable form of such notification of prisoners for trial, viz.:—

County of and City and County of
Spring Assize County, No. (to wit).
List of the prisoners committed to Her Majesty's prison at
for trial at the Spring Assizes for the said Spring Assize County
No. at the , aforesaid on day the day
of 18 before the Honourable Sir , Knight, one of the
Judges of Our Lady the Queen of the High Court of Justice (*g*)—

Name of Prisoner.	Offence as charged in Commitment.

And notice is hereby given that the persons bound by recognizances to appear and prosecute or give evidence for or against the above-named prisoners or any of them shall appear and prosecute or give evidence at the , aforesaid on day the day of 18 at o'clock in the forenoon.
Esquire
High Sheriff [*or* Sheriff].

This notice should be inserted in one or more leading local newspapers about two or three times prior to the Commission. It is usually given by the clerk of the peace in the case of quarter sessions.

(*g*) See note (*g*) on previous page.

Juries.

Qualification and Liability to Serve.

The qualification of grand jurors is not defined by statute, but, it seems, that all gentlemen of position in the county, who are not peers, may be summoned by the undersheriff. See, however, the list of persons exempt from service on any jury, *post*, p. 452. A list of the names of persons usually summoned on the grand jury will have been kept by the preceding undersheriff. In the case of liberties, franchises, cities, boroughs, or towns corporate, not being counties or cities, boroughs or towns being counties of themselves, and which respectively possess any jurisdiction, civil or criminal, the qualification is the same for service on a grand, special, or common jury. Accordingly, the selection of the grand jury rests solely with the sheriff in such a case.

Qualification
of grand
jurors.

In the case of counties as distinguished from liberties, franchises, cities, boroughs or towns corporate not being counties, or cities, boroughs or towns being counties of themselves, which respectively possess any jurisdiction, civil or criminal, the following statutes prescribe the qualification and liability to serve on common and special juries.

By the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 1, "Every man, except as hereinafter excepted (*h*), between the ages of twenty-one years and sixty years residing in any county in England, who shall have in his own name or in trust for him, within the same county, ten pounds by the year above reprises, in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person, or who shall have within the same county twenty pounds by the year above reprises, in lands or tenements, held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, or who being a householder shall be rated or assessed to the poor rate, or to the inhabited house duty in the county of Middlesex, on a value of not less than thirty pounds, or in any other county on a value of not

Qualification
of county
jurors.

(*h*) Exemption from service on juries is now provided for by the Juries Act, 1870 (33 & 34 Vict. c. 77), *post*, p. 452.

less than twenty pounds, or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on juries for the trial of all issues joined in any of the King's Courts of Record at Westminster, and in the superior Courts, both civil and criminal, of the three counties palatine, and in all courts of assize, such issues being respectively triable in the county in which every man so qualified respectively shall reside, and shall also be qualified and liable to serve on grand juries, in courts of sessions of the peace, and on petty juries, for the trial of all issues joined in such courts of sessions of the peace, and triable in the county, riding, or division in which every man so qualified respectively shall reside." Under this section there was a different qualification for service on juries in Wales, but such distinction was abolished and such qualification made the same as that of persons in England by sect. 7 of the Juries Act, 1870 (33 & 34 Vict. c. 77).

By sect. 20 of the County Juries Act, 1825, juries in all criminal Courts are to be returned as before, "except that the jurors shall be returned from the body of the county, and not from any hundred or hundreds, or from any particular venue within the county, and shall be qualified according to this Act." As to the former method of returning juries in criminal Courts, see 3 Hen. 8, c. 12.

The qualification of a common juror as prescribed by the County Juries Act, 1825 (6 Geo. 4, c. 50), is not affected by the Juries Act, 1870 (33 & 34 Vict. c. 77), but remains as hitherto.

Qualification
of county
special jurors.

Sections 30 to 36 of the County Juries Act, 1825 (6 Geo. 4, c. 50), relate to special juries, but the law with regard to special juries is now governed by the Common Law Procedure Acts of 1852 and 1854, and the Juries Act, 1870 (33 & 34 Vict. c. 77).

After a provision by sect. 4 of the Juries Act, 1870, that that Act shall be construed as one with the above County Juries Act, 1825, and any amending Act, and that such parts of the said Act and of any other Act or Acts as are inconsistent with this Act are thereby repealed, it is enacted by sect. 6 that "Every man whose name shall be in the jurors' book for any county in England or Wales, or for the county of the City of London, and who shall be legally entitled to be called an esquire, [as to who are so entitled, see footnote to this Act in Paterson's, 1870, Practical Statutes, p. 324], or shall be a person of higher degree,

or shall be a banker or merchant, or who shall occupy a private dwelling-house rated or assessed to the poor rate or to the inhabited house duty on a value of not less than one hundred pounds in a town containing, according to the census next preceeding the preparation of the jury list, twenty thousand inhabitants and upwards, or rated or assessed to the poor rate or to the inhabited house duty on a value of not less than fifty pounds elsewhere, or who shall occupy premises other than a farm rated or assessed as aforesaid on a value of not less than one hundred pounds, or a farm rated or assessed as aforesaid on a value of not less than three hundred pounds, shall be qualified and liable to serve on special juries in every such county in England and Wales, and in London respectively."

By sect. 11 the overseers are to specify the special jurors in the jury list. It is thus rendered unnecessary for the sheriff to keep a special jury list, and he is, indeed, prohibited from doing so by sect. 15, which provides that the sheriff must no longer remove the names of special jurors from the jurors' book. Moreover, by sect. 19, sub-sect. 2, *post*, p. 455, no person is exempt from serving on petty juries by reason of his being on any special jurors' list, or being qualified to serve as a grand juror. The apparent object is to secure persons of intelligence on petty juries at assizes, to provide for which object the panel should consist of a suitable proportion, say a third, of persons belonging to the class of special jurors.

By sect. 14, the justices at petty sessions shall certify the jury lists after revision, "and the decision of such justices as to the qualifications of persons marked as special jurors in the lists so revised by them shall, as respects those lists, be final."

By sect. 16, "Any special jurymen summoned to serve in any one of the said superior Courts shall be qualified and be liable, in case of necessity, to serve in any other of the said Courts as if he had been originally summoned as one of the jurymen for the trial of special jury causes in such last-mentioned Court." But in relation to this section see sect. 19, sub-sect. 3 of this Act, *post*, p. 458.

As to the qualification and liability of persons to serve on juries in liberties, franchises, cities, boroughs, and towns, and counties of cities, boroughs, and towns, sect. 50 of the County Juries Act, 1825 (6 Geo. 4, c. 50), enacts that—"The qualification hereinbefore required for jurors, and the regulations for

Overseers to specify special jurors in list;

and the names to be retained in jurors' book.

Decision of justices as to qualification of persons as special jurors final.

Special jurors summoned for one Court liable to serve in another.

Qualification of jurors in liberties, cities, boroughs, and counties of cities, &c.

Qualification
of jurors in
City of
London

procuring lists of persons liable to serve on juries, shall not extend to the jurors or juries in any liberties, franchises, cities, boroughs, or towns corporate not being counties, or in any cities, boroughs, or towns being counties of themselves, which shall respectively possess any jurisdiction, civil or criminal; but in all such places the sheriffs, bailiffs, or other ministers having the return of juries shall prepare their panels in the manner heretofore accustomed: Provided always, that no man shall be impanelled or returned by the sheriffs of the City of London as a juror to try any issue joined in His Majesty's Courts of Record at Westminster, or to serve on any jury at the sessions of oyer and terminer, gaol delivery, or sessions of the peace to be held for the said city, who shall not be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce, within the said city, and have lands, tenements, or personal estate of the value of one hundred pounds; and that the lists of men resident in each ward of the City of London who shall be so qualified as herein mentioned shall be made out, with the proper quality or addition and the place of abode of each man, by the parties who have heretofore been used and accustomed in each ward to make out the same respectively; and that such shop, warehouse, counting-house, chambers, or office as aforesaid, shall for the purposes of this Act be respectively deemed and taken to be the place of abode of every occupier thereof: Provided also, that no man shall be impanelled or returned to serve on any jury for the trial of any capital offence in any county, city, or place who shall not be qualified to serve as a juror in civil causes within the same county, city, or place; and the same matter and cause being alleged by way of challenge, and so found, shall be admitted and taken as a principal challenge; and the person so challenged shall and may be examined, on oath, of the truth of the said matter."

The question naturally arising out of such statutory reservation in respect of jury panels for cities, &c., and counties of cities, &c. is: What is the meaning of "the manner heretofore accustomed?" Apparently the only unrepealed prior Act relating to city and borough juries is that of 23 Hen. 8, c. 13, entitled "An Act for trial of murders in cities and towns," by sect. 1 of which Act it is provided that "Every person and persons being the king's natural subjects born, which either by the name of a citizen or of a freeman or any other name doth

enjoy and use the liberties and privileges of any city borough or town corporate where he dwelleth and maketh his abode, being worth in moveable goods and substance to the clear value of forty pounds be from henceforth admitted in trial of murders and felonies in every sessions and gaol delivery to be kept and holden in and for the liberty of such cities, boroughs, or towns corporate, albeit they have no freehold; any Act, statute, use, custom, or ordinance to the contrary hereof notwithstanding," and by sect. 2, "Provided always that this Act do not extend in any manner of wise to any knight or esquire dwelling, abiding, or resorting in or to any such city, town, or borough corporate; anything in the same Act mentioned or declared to the contrary hereof notwithstanding."

Sect. 36 of the County Juries Act, 1825 (6 Geo. 4, c. 50), provides for the striking of the special jury list in causes arising in counties of cities and towns (except the City of London) from "the books or lists of persons qualified to serve on juries" within such counties of cities or towns. There, however, seems to be no statutory provision for keeping such above-mentioned books or lists, nor any further provision for preparing jury panels or revising jury lists in cities, counties of towns or boroughs, whilst it appears to be the general, if not universal, practice for sheriffs of provincial cities, boroughs, and counties of towns to select their grand, special, and common jurors alike simply from the burgess roll in the same manner as clerks of the peace impanel jurors under the provisions for the summoning of juries for borough quarter sessions and borough civil courts of the Municipal Corporations Acts. Indeed, it is contended by an experienced city undersheriff, who has carefully studied the question, that such is the only and proper mode of selecting jurors for provincial cities, boroughs, and counties of towns. Be that as it may, it is submitted that the above question is in a sufficiently unsatisfactory position to make an early amendment of the law in this respect desirable.

Mode of striking special jurors in counties of cities and towns (except London).

As to the qualification of jurors for the City of London, see in particular the provisions relating thereto in sect. 50 of the County Juries Act, 1825 (6 Geo. 4, c. 50), *ante*, p. 450, and sect. 6 of the Juries Act, 1870 (33 & 34 Vict. c. 77), *ante*, p. 448. Sect. 89 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), which effects an adjustment of the law as regards Courts, juries, sittings, and legal proceedings in Middlesex and

Qualification of jurors in City of London.

London, provides that nothing in that section shall alter the qualification of persons to serve as jurors within the City of London. Jurors in the City of London are liable to serve in the Royal Courts of Justice, the Central Criminal Court, the quarter sessions, the Mayor's Court, the Secondary's Court, and the City of London Court.

Aliens to be qualified after ten years' domicile, but not otherwise.

By sect. 8 of the Juries Act, 1870 (33 & 34 Vict. c. 77), "Aliens having been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, shall be qualified and shall be liable to serve on juries or inquests in England and Wales as if they had been natural born subjects of the Queen; but, save as aforesaid, no man not being a natural born subject of the Queen shall be qualified to serve on juries or inquests in any Court or on any occasion whatsoever."

Convicts, unless pardoned, and outlaws, disqualified.

By sect. 10 of the same Act, "No man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any Court or on any occasion whatsoever."

Exemption from Service.

Exemptions under the Juries Act, 1870.

By the Juries Act, 1870 (33 & 34 Vict. c. 77), sect. 9, "The persons described in the schedule hereto shall be severally exempt as therein specified from being returned to serve and from serving upon any juries or inquests whatsoever; and their names shall not be inserted in the lists of the persons qualified and liable to serve on the same, but, save as aforesaid, no man otherwise qualified to serve on such juries or inquests shall be exempt from serving thereon, any enactment, prescription, charter, grant, or writ to the contrary notwithstanding." The following is the list of persons referred to and set out in the schedule to the Act:—

"Peers.

"Members of Parliament.

"Judges.

"Clergymen.

"Roman Catholic priests.

"Ministers of any congregation of Protestant dissenters and of Jews whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster.

- “*Serjeants (i)*, barristers-at-law, certificated conveyancers, and special pleaders, if actually practising.
- “Members of the Society of Doctors of Law and advocates of the civil law, if actually practising.
- “*Attornies (i)*, solicitors, and *proctors (i)*, if actually practising and having taken out their annual certificates, and their managing clerks, and notaries public in actual practice.
- “Officers of the Courts of Law and Equity, and of the Admiralty and Ecclesiastical Courts, including therein the Courts of Probate and Divorce, and the clerks of the peace or their deputies, if actually exercising the duties of their respective offices.
- “Coroners.
- “Gaolers, and keepers of houses of correction, and all subordinate officers of the same.
- “Keepers in public lunatic asylums.
- “Members and licentiates of the Royal College of Physicians in London, if actually practising as physicians.
- “Members of the Royal College of Surgeons in London, Edinburgh, and Dublin, if actually practising as surgeons.
- “Apothecaries certificated by the Court of Examiners of the Apothecaries Company, and all registered medical practitioners and registered pharmaceutical chemists, if actually practising as apothecaries, medical practitioners, or pharmaceutical chemists respectively.
- “Officers of the navy, army, militia, and yeomanry, while on full pay.
- “The members of the Mersey Docks and Harbour Board.
- “The Master, Wardens, and Brethren of the Corporation of Trinity House of Deptford Strond.
- “Pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed under any Act of Parliament or charter for the regulation of pilots.
- “The household servants of her Majesty, *her heirs and successors (i)*.

(i) The words in italics are repealed by the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54).

“Officers of the Post Office, commissioners of customs, and officers, clerks, or other persons acting in the management or collection of the customs, Commissioners of Inland Revenue, and officers or persons appointed by the Commissioners of Inland Revenue or employed by them or under their authority or direction in any way relating to the duties of inland revenue.

“Sheriffs’ officers.

“Officers of the rural and metropolitan police.

“Magistrates of the Metropolitan Police Courts, their clerks, ushers, doorkeepers, and messengers.

“Members of the council of the municipal corporation of any borough, and every justice of the peace assigned to keep the peace therein, and the town clerk and treasurer for the time being of every such borough, so far as relates to any jury summoned to serve in the county where such borough is situate.

“Burgesses of every borough in and for which a separate Court of quarter sessions shall be holden so far as relates to any jury summoned for the trial of issues joined in any Court of general or quarter sessions of the peace in the county wherein such borough is situate.

“Justices of the peace so far as relates to any jury summoned to serve at any sessions of the peace for the jurisdiction of which he is a justice.

“Officers of the Houses of Lords and Commons.”

Additional
statutory
exemptions.

The following additional persons are exempt from serving on juries, viz. :—

Registrars of births, deaths, and marriages (Births and Deaths Registration Act, 1837, 7 Will. 4 & 1 Vict. c. 22, s. 18).

Persons acting as commissioners in the execution of the Income Tax Acts, to whom certificates thereof have been granted by the Commissioners of Inland Revenue under the Income Tax Act, 1842, s. 35, so long as such certificates continue in force (Customs and Inland Revenue Act, 1871, 34 & 35 Vict. c. 103, s. 30).

General commissioners and additional commissioners, to whom certificates have been granted by the Board under the Income Tax Act, 1842, s. 35, so long as such certificates continue in force (Taxes Management Act, 1880, 43 & 44 Vict. c. 19, s. 40).

Commissioners, officers, clerks, and other persons acting in the management or service of the customs (Customs Laws Consolidation Act, 1876, 39 & 40 Vict. c. 36, s. 9).

Commissioners, collectors, officers, and persons employed under the authority of the Commissioners in relation to Inland Revenue (Inland Revenue Regulation Act, 1890, 53 & 54 Vict. c. 21, s. 8).

Persons registered under the Dentists Act, 1878, if desirous of exemption (Dentists Act, 1878, 41 & 42 Vict. c. 33, s. 30).

Soldiers in her Majesty's regular forces (Army Act, 1881, 44 & 45 Vict. c. 58, s. 147).

As to exemption from serving on juries on the ground of age, see the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 1, *ante*, p. 447. Exemption on ground of age.

Formerly, by the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9, the inhabitants of the city and liberty of Westminster were exempt from serving on any jury at the sessions of the peace for the county of Middlesex. This exemption has now, however, been abolished by sect. 89 of the Local Government Act, 1888 (51 & 52 Vict. c. 41). Exemption of inhabitants of Westminster abolished.

By the Juries Act, 1870, s. 12, "No person whose name shall be in the jury book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness not claimed by him at or before the revision of the list by the justices of the peace, and a notice to that effect shall be printed at the bottom of every jury list." Sect. 9 of the Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36), which exempts commissioners, officers, clerks, and other persons acting in the management or service of the customs from serving on juries, expressly provides that sect. 12 of the Juries Act, 1870, shall not apply to persons thereby exempted. Disqualification or exemption to be claimed before revision of list.

By sect. 19, sub-s. 2, "No person shall be exempted from serving as a common juror by reason of his being on any special jurors' list, or being qualified to serve as a grand juror." Person on special jury list not exempt from serving as common juror.

Summoning.

(1.) *Counties.*

It will be observed that twenty-four grand jurors are to be summoned, but it would seem that no more than twenty-three can be sworn in view of the necessity of the bill being found by a majority and of twelve being unanimous. In the case of Summoning and marshalling grand jurors.

indictments preferred in the Queen's Bench before a grand jury of the county of Middlesex (as to which, see *infra*), the jury must not, according to Short and Mellor's Practice of the Crown Office, p. 182, consist of more than twenty-three or less than thirteen. The mode of marshalling the grand jury seems to be essentially *lex non scripta*, but the following order may, it is conceived, be safely adopted, viz. :—Sons of peers, baronets in their order of creation, sheriff peers (*i. e.*, those who have served the office of high sheriff), gentlemen on the rota of shrievalty in order, county magistrates in order of seniority, and such others as the sheriff may elect to summon. The first juryman answering to his name is the foreman. Grand jurors are to be summoned in the same manner as common and special jurors, as to which, see *post*. It is, nevertheless, customary in some counties to invite the grand jurors by letter, primarily with a view to thereby avoid the attendance, often from a distance, of any whose services may not be ultimately required; but the attendance of grand jurors could not, it is conceived, be enforced under this method.

Subject to the foregoing remarks respecting county grand jurors, the following are the statutory provisions applicable to the summoning of county jurors.

Lists of jurors to be copied by clerk of peace into "the Jurors' Book" to be delivered to sheriff.

After providing for the making out of lists of persons qualified and liable to serve on juries, with their residences, titles, &c., it is enacted by the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 12, that such lists are to be kept by the clerk of the peace and copied into a book to be delivered to the sheriff of the county, or his undersheriff, within six weeks next after the close of the quarter sessions therein mentioned, "which book shall be called 'The Jurors' Book for the year ' (inserting the calendar year for which such book is to be in use); and that every sheriff on quitting his office shall deliver the same to the succeeding sheriff; and that every jurors' book so prepared shall be brought into use on the first day of January after it shall be so delivered by the clerk of the peace to the sheriff or his undersheriff, and shall be used for one year then next following."

Judges may direct jurors to be summoned to serve indiscriminately on civil and criminal sides divided into two sets.

By sect. 22, the judges may direct the sheriff to summon a sufficient number of jurors to serve indiscriminately on the criminal and civil sides, and they may also direct two sets of jurors to be summoned, one to attend at the beginning of each assize, and the other to attend the residue thereof. The sheriff shall, in the summons to the jurors in each of such sets, specify

whether the juror named therein is in the first or second set, and at what time the attendance of such juror will be required.

By sect. 43, no sheriff or other officer shall take any money or reward, either directly or indirectly, to excuse any man from serving or from being summoned to serve on juries, and no bailiff or other officer shall summon any man to serve thereon, other than those whose names are specified in the sheriff's warrant or mandate. Every person so offending shall be liable to be fined according to the nature of the offence.

Sheriff, &c., taking money to excuse persons from serving, and bailiff inserting names not in warrant, may be fined.

By the Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 4, it is provided that the sheriffs of the City of London, and of the counties of Middlesex, Essex, Kent, and Surrey, respectively, shall execute and obey all precepts and process which the justices and judges of the Central Criminal Court shall award, issue, and direct to them, and shall, whenever required and commanded, summon and return from the said City of London and county of Middlesex, and from the parts of the said counties of Essex, Kent, and Surrey within the limits of the Act, a competent number of persons qualified according to law to inquire of, present, and try all offences and other matters cognizable by the justices and judges of the Central Criminal Court.

Precepts of judges of Central Criminal Court, by whom to be executed.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 107, "The sheriffs of London and Middlesex respectively, shall, pursuant to a precept under the hand of a judge of any of the said superior courts, and without any other authority, summon a sufficient number of common jurors for the trial of all issues in the superior courts of common law, in like manner as before this Act; and it shall be the duty of the sheriffs respectively to apply for and procure such precept to be issued in sufficient time before each term to enable them to summon the jurors in manner aforesaid." Middlesex jurors, both special and common, are now, however, summoned in pursuance of a letter from the associate.

Precepts of judges of Superior Courts, by whom to be executed.

By sect. 112, "Where notice has been given to try by special jury, either party may, six days before the first day of the sittings in London or Middlesex, or adjournment day in London, or commission day of the assizes, give notice to the sheriff that such cause is to be tried by a special jury; and in case no such notice be given no special jury need be summoned or attend, and the cause may be tried by a common jury, unless otherwise ordered by the Court or a judge." In London and

Special jurors need not be summoned, unless notice be given by either party.

Exception as to London and Middlesex.

Middlesex it seems to be now unnecessary to give notice to the sheriff as, according to the Juries Act, 1870, s. 16, *post*, not less than thirty special jurors must be summoned for each Court.

If special jury not summoned, cause to be tried by common jury.

By sect. 113, "In all cases where notice is not given to the sheriff that the cause is to be tried by a special jury, and by reason thereof a special jury is not summoned or does not attend, the cause may be tried by a common jury, to be taken from the panel of common jurors, in like manner as if no proceedings had been had to try the cause by a special jury."

Summoning special jury under old system.

In reference to summoning a special jury under the old system, which, it seems, is in some cases deemed desirable, see the County Juries Act, 1825 (6 Geo. 4, c. 50), and also the Juries Act, 1870 (33 & 34 Vict. c. 77), ss. 16 and 17, and Short and Mellor's Practice of the Crown Office, pp. 213—215.

Court may make rule or order upon sheriff for summoning jury.

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 59, "The several Courts, or any judge thereof, may make all such rules or orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury for the trial of any cause or matter depending in such Courts, at such time and place and in such manner as they or he may think fit."

In London and Middlesex not less than thirty special jurors to be summoned for each Court.

By the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 16, "In London and Middlesex, on the occasion of any sittings of the Superior Courts, or any of them, for the trial of issues, a sufficient number of special jurymen, not less than thirty for each Court, shall be summoned to try the special jury causes triable at such sittings. The said jurymen shall be summoned in pursuance of a precept under the hand of any one of the judges of the said Superior Courts in the same manner in all respects in which special jurymen are summoned in pursuance of precepts issued by the judges of assize."

No person to be summoned to serve more than once in a year;

By sect. 19, "The following regulations shall be enacted with respect to the summoning of jurors (*inter alia*):—That no person shall be summoned to serve on any jury or inquest (except a grand jury) more than once in any one year, unless all the jurors upon the list shall have been already summoned to serve during such year: Provided that nothing herein contained shall prejudice the operation of any certificate granted under the County Juries Act, 1825, ss. 41 and 42 (*post*, p. 486). No person shall be summoned or liable to serve as a juror in more than one Court on the same day."

nor in more than one Court on same day.

By sect. 21, "It shall be lawful for any sheriff or other officer to whom any precept for summoning jurors shall be addressed, with the consent of the person or persons by whom such precept shall have been issued, to make regulations as to the attendance of jurors during the time for which they shall be summoned, and in particular as to the days on which, and the time during which, they are to attend; such regulations may be sent to any juror, together with the summons requiring him to attend on any jury, and when so sent shall be deemed to be part of such summons."

Sheriff to make regulations as to attendance of jurors.

By 35 & 36 Vict. c. 52 (An Act to regulate the summoning of Grand Juries in Middlesex), s. 1, it is provided that, "From and after the passing of this Act it shall not be necessary to summon a grand jury of Middlesex to come before the Queen at Westminster in any term unless the master of the Crown Office has before the fourth day of that term received notice of some business, intended to be brought before them, and it shall be the duty of the said master to give notice to the sheriff accordingly."

Grand jury in Middlesex need not be summoned unless notice is given of business.

By the Crown Office Rules, 1886, r. 158, "Writs of *venire facias*, or other writs for the summoning of juries, shall no longer be used, but the jury, whether special or common, shall be taken from the list of persons summoned for the sittings or assizes, and a panel shall be annexed to the record as in civil cases. Either the prosecutor or the defendant may, except in case of felony, obtain a special jury upon giving the like notice as is required in civil cases (1), and the Court or a judge may, at the instance of either party, order that a special jury be struck, as provided for by the Juries Act, 1870. And when the jury has been reduced either party may draw up an order at the Crown Office directing the sheriff to summon that particular jury at such time and place as may be required." (For form of judge's order to strike such special jury see Form No. 100 in Appendix D to Rules).

Venire facias abolished.

Prosecutor or defendant, except in felony, may obtain special jury on giving notice.

With regard to trial at bar (for particulars of which see 11th ed. Stephen's Commentaries, Vol. IV.), "the Court may direct the jury to be summoned from the county in which the offence was committed, or from any other county not exempt by law at any time after joinder of issue. The order for the jury

Jury to be summoned for trial at bar.

(1) As to which see the R. S. C. 1883, Ord. XXXVIII. r. 7 (b), (c), (d).

shall be lodged with the sheriff of such county in sufficient time for the jury to be summoned six days before the trial." Crown Office Rules, 1886, r. 163. And see Short and Mellor's Practice of the Crown Office, pp. 309, 310.

(2.) *Cities and Boroughs and Counties of Towns.*

As already intimated, jurors, grand, common, and special, are, in the case of provincial cities, &c., selected by the sheriffs simply from the burgess lists. As in the case of the county grand jury, the first juryman answering to his name is the foreman.

(3.) *City of London.*

List of jurors,
how made up.

In the month of October in each year, the Secondary issues printed directions (according to the under-mentioned form) to the aldermen, deputies, common councilmen, and ward clerks of each ward in the City of London. The ward clerk then instructs the ward beadle to go round the ward from house to house with a copy of the jury list in force and make the necessary alterations. The amended list is then submitted by the ward clerk to the alderman, deputy, and common council of the ward at a meeting in wardmote, when the list is carefully gone through, such further alterations being made as may be found necessary. The list is then finally settled and signed by the alderman, deputy, and members of the Common Council present, and transmitted to the Secondary. At present there are thirty-four distinct returns of jurors in the City of London, twenty-seven from wards in themselves, and seven from parishes or precincts. The Secondary, on receipt of the above returns, has the names of all persons entitled to be placed on the special jury by reason of their being described as merchants, bankers, esquires, or rated at 100*l.* a year, numbered consecutively, called the "Special Jurors' List" (*m*). All the above lists are then bound together in alphabetical order, in a book which is called "The Jury Book for the Year 18 ."

Jurors sum-
moned by
rotation.

The jurors—grand, special, and common—are summoned in rotation, no person being summoned twice until the whole of the jury list has been gone through, which, at the present time, takes between three and four years, except in the case where a special jury is struck under the old system, viz., by ballot.

(*m*) This special jury list is only made for the purpose of balloting.

Then the special jury is nominated from the entire list of special jurors.

The following is the form of the Secondary's directions mentioned above:—

Secondary's Office,
[Address]
[Date].

Sir,

In pursuance of the Counties Juries Act, 1825, and the Juries Act, 1870, you are hereby required to return to this office on or before the first day of December next a list of all persons in your ward qualified to serve on juries in the City of London.

The qualification by the 50th section of the Counties Juries Act, 1825, is being "a householder, or the occupier of a shop, warehouse, counting-house, chambers or office for the purpose of trade or commerce, within the said city, and having lands, tenements, or personal estate of the value of 100*l*."

The qualification of special jurors is defined by section 6 of the Juries Act, 1870, which enacts that "Every man whose name shall be in the jurors' book for any county in England or Wales, or for the county of the City of London, and who shall be legally entitled to be called an esquire, or shall be a person of higher degree, or shall be a banker or merchant, or who shall occupy a private dwelling-house rated or assessed to the poor rate or to the inhabited house duty on a value of not less than one hundred pounds in a town containing, according to the census next preceding the preparation of the jury list, twenty thousand inhabitants and upwards, or rated or assessed to the poor rate or to the inhabited house duty on a value of not less than fifty pounds elsewhere, or who shall occupy premises other than a farm rated or assessed as aforesaid on a value of not less than one hundred pounds, or a farm rated or assessed as aforesaid on a value of not less than three hundred pounds, shall be qualified and liable to serve on special juries in every such county in England and Wales, and in London respectively"; and by section 11 of the said Juries Act, 1870, it is enacted that "In making out the lists of persons within their respective parishes and townships qualified to serve as jurors, the overseers shall specify which of such persons are, in the judgment of such overseers, qualified as special jurors, and shall also specify in every case the nature of the qualification and also the occupation and the amount of the rating or assessment of every such person."

By sect. 8 of the Jurors Act, 1870, aliens having been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, are rendered liable to serve on juries or inquests.

You will distinguish persons competent as the grand from the petit jurors by prefixing the letter G against their names⁽ⁿ⁾.

It is particularly requested that you will distinguish partners by a circumflex and affix the number of each house opposite the juror's

⁽ⁿ⁾ Whilst there is strictly no qualification for a grand juror, but he must be selected by the sheriff at discretion, the above appears to be the custom in the City of London.

name, and state the rating or rental where the amount is 100*l.* and upwards per annum.

As it is desirable that the return should be accurate and as, by the 13th section of the Juries Act, 1870, penalties are enacted for wrongly inserting or omitting the names of persons in your return, your attention is directed to the following exemptions from serving on juries by the 9th section of the above Juries Act, 1870, and the schedule therein given, the tenor of which schedule is as follows:—

SCHEDULE.

[*Here follows the list of persons so exempt in the schedule to the Juries Act, 1870, as to which see ante, p. 452.*]

Persons under the age of twenty-one years and above sixty years are not duly qualified and should be omitted from your return.

As the returns from the several wards are required to be bound into one book, it is proper that they should be made upon paper of uniform size; it is therefore expedient that you use foolscap of a size corresponding with this letter.

I have the honour to be
Sir,

Your most obedient servant

[*Signed*] _____.
Secondary of the City of London.

N.B.—The Secondary is directed, in forwarding the above letter, to add the following extract of the report of the General Purposes Committee agreed to by the Court of Aldermen:—

“That the ward clerk should make out, or procure to be made out, on his responsibility, a list of all persons liable to serve on juries within his ward with a correct description of their residence, calling and business.

“That for the purpose of enabling him to do so, he should be authorized and directed to require the ward beadle, or other competent person, yearly to go from house to house throughout the ward to procure the necessary information.

“That such return should include the names of all partners in any firm, it being the custom in several wards to return the name of one partner only in a firm, though this practice is manifestly illegal, the statute requiring that all persons who are liable to serve should be returned. To lessen the inconvenience to parties as far as possible, it is the practice of the Secondary to summon only one of such partners to attend at the same time on any grand, special, or petit jury.

“That the ward clerk should be careful to exclude from such list of jurors the names of all persons above the age of sixty, likewise such as are suffering from permanent illness or incapacity, and also such as are disqualified or excused by reason of being aliens (unless domiciled in England for ten years or upwards), or keeping a post office, or for any of the causes mentioned in the Juries Act, 1870, or being a commissioner of income and property tax (see 34 & 35 Vict. c. 103, s. 30), or being a dentist registered under the Dentists Act, 1878 (see sect. 30), and not desiring to serve on juries.

“That the alderman, deputy and common council of the ward

should go carefully through such list so to be submitted to them by the ward clerk and revise the same and state the qualification of each person, denoting whether a grand or petit juror, and properly describing such persons as they think should be placed on the list of special jurors according to the statute.

"The list then to be signed and transmitted to the Secondary."

Forms of Summons.

1. *Summons by Sheriff to Jury for Assizes (o).*

County of
[or City of] (p). To .
To wit.

Greeting.—By virtue of a precept to me directed from [*here set out name and title of judge or judges*] and of "The Juries Act, 1862" I do hereby summon and require you personally to be and appear before her Majesty's said judge [*or judges*] and others his [*or their*] fellow justices aforesaid at the Assizes to be holden at the in in and for the said county [*or city*] of on day the day of next at of the clock in the noon precisely, then and there to serve as a [grand, special, or common] juror for the trial of all issues which may come on for trial at the said assizes, and you are required to remain in attendance during each day of the sitting of the Court until the business is finished.

Herein you are not to fail. Given at under the seal of my office this day of in the year of our Lord, one thousand eight hundred and .

——— Sheriff of .

Sheriff's Office,
——— Street .

Notice as to Excuses.

The judge in pursuance of the Act of Parliament will impose such fine as his Lordship shall think proper upon all jurors absent without his Lordship's leave. In case a juror claims to be exempt in consequence of previous service he must immediately transmit the certificate of such service to the undersheriff. If a juror through illness cannot attend the Court, such juror, or his medical attendant, must make affidavit of the fact before a magistrate and transmit the same to the undersheriff. The affidavit need not be written on a stamp and the Court will not receive either a statutory declaration or a medical certificate that is not sworn to.

. By sect. 12 of the Jurors Act, 1870, it is enacted as follows:—"No person whose name shall be in the jury book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness not claimed by him at or before the revision of the list by the justices of the peace, and a notice to that effect shall be printed at the bottom of every jury list."

(o) In some places the grand, special, and common jurors are summoned by the bailiff under precept from his sheriff, necessary forms for which can be obtained.

(p) This form is suitable for both counties and cities.

Certificates of Service.

By 6 Geo. 4, c. 50, s. 40, it is enacted that "every man so summoned, and having duly attended or served until discharged by the Court shall (upon application by him made to such sheriff or undersheriff, before he shall depart from the place of trial), receive a certificate testifying such his service, which certificate the sheriff or undersheriff is hereby required to give on payment of one shilling: provided always, that nothing herein contained shall extend to any grand jurors or special jurors."

2. Summons by Sheriff to Jury for Quarter Sessions (q).

County of . . . To . . .
To wit.

Greeting.—By virtue of a precept to me directed from two of the justices of our Lady the Queen assigned to keep the peace of our said Lady the Queen in the said county and also to hear and determine divers felonies, trespasses, and other misdemeanours done and committed in the said county, and of "The Juries Act, 1862," I do hereby summon and require you personally to be and appear at the next general quarter sessions of the peace to be holden at in and for the county of on the day of now next ensuing at of the clock in the noon precisely then and there to serve as a grand [or petty] juror and to inquire into and do all those things which then and there on the part and behalf of our said Lady the Queen shall be enjoined you.

Herein you are not to fail. Given at under the seal of my office this day of in the year of our Lord one thousand eight hundred and . . .

— — — Sheriff of . . .

Sheriff's Office,
— — — Street, . . .

* * Certificates of the illness of jurymen, as excuses for non-attendance, will in no case be allowed without affidavit or proof upon oath in open Court verifying the same.

* * By sect. 12 of the Jurors Act, 1870, it is enacted as follows:—"No person whose name shall be in the jury book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness not claimed by him at or before the revision of the list by the justices of the peace, and a notice to that effect shall be printed at the bottom of every jury list."

[In these forms the words "Jury Summons" must be legibly written or printed on the same side of the summons as the address.]

Service of Summons.

How long
summons to
be served
before date of
attendance.

By the County Juries Act (6 Geo. 4, c. 50), sect. 25, "The summons of every man to serve on juries, not being special juries, in any of the Courts aforesaid, shall be made by the

(q) See preceding note (o) as to summoning of jurors by bailiff.

proper officer ten days at the least before the day on which the juror is to attend, by showing to the man to be summoned, or in case he shall be absent from the usual place of his abode, by leaving with some person there inhabiting, a note in writing, under the hand of the sheriff or other proper officer, containing the substance of such summons; and the summons of every man to serve on special juries in any of the Courts aforesaid shall be made by the like persons, and in the like manner as aforesaid, three days at the least before the day on which the special juror is to attend: Provided always, that this Act shall not require any longer time for summoning any jurors in the City of London or county of Middlesex than has been heretofore by law required." In view, however, of the repeal by virtue of the Juries Act, 1870, of any inconsistent portions of the County Juries Act, 1825, it would seem that, subject to the above reservation as to summoning jurors in the City of London and county of Middlesex, six days is now the statutory limit for service of jury summonses. See sect. 20 of the Juries Act, 1870, *post*, p. 466.

By sect. 11 of the Juries Act, 1862 (25 & 26 Vict. c. 107), it is provided that, "Any person liable to serve on any jury may be summoned as heretofore, or in the manner following; that is to say, the sheriff or other proper officer may make out a summons and affix the seal of his office thereto, and such summons, having the words 'jury summons' legibly written or printed on the same side as the address, may be sent open by the post, prepaid, and directed to the person so required to serve as juror at his place of abode as described in the 'jurors' book,' which said summons, together with a duplicate endorsed with the name and address of the juror to whom the original summons is directed, shall be taken to the postmaster of any post office where money orders are received or paid, within such hours as shall have been previously agreed upon at such post office, and under such regulations with respect to the registration of such summons and the fee to be paid for such registration (which fee shall in no case exceed twopence over and above the ordinary rate of postage) as shall from time to time be made by the Postmaster-General in that behalf; and in all cases in which such fee shall have been duly paid the postmaster shall compare the address of the said summons with that of the duplicate, and on being satisfied that they are alike shall forward the summons

All jurors
may be sum-
moned by
post.

to its address by the post, and shall return the duplicate to the party bringing the same, duly stamped with the stamp of the said post office; and the production by the party who posted such summons of such stamped duplicate shall be evidence of the summons having been delivered at the dwelling-house of the person whose name and address is thereon endorsed, at the place mentioned in such endorsement, on the day on which such summons would, in the ordinary course of post, have been delivered, provided it shall appear that the same was not returned by the Post Office as undelivered; and any summons sent by the post as before mentioned, and not so returned as undelivered, shall be considered in all respects as duly served; and in the event of any person to whom any summons shall be addressed being ascertained to be dead, or to have permanently left the place to which such summons is addressed, the post-master or letter carrier of the place in which the summons shall then be shall endorse thereon the reason of the non-delivery thereof, and forward the same in the usual course of post to the Returned Letter Office in London in order that it may be returned to the sender: provided always, that when any summons shall be served by post under the provisions of this Act, two additional days shall be allowed for the transmission of such summons by post, over and above the number of days required by law for the service of a summons, before the day on which the juror is required to attend." But by sect. 14, "Nothing in this Act contained shall alter or affect the mode of procedure heretofore pursued in the making out of jury lists or the summoning of jurors in the City of London." The above mode of service is now generally adopted.

Juror not
liable for non-
attendance,
unless sum-
mons served
six days
before day of
attendance.

By the Juries Act, 1870 (33 & 34 Vict. c. 77), sect. 20, "No juror shall be liable to any penalty for non-attendance on any jury unless the summons requiring him to attend be duly served six days at least before the day on which he is required to attend, but no longer period than such six days shall in any case be required between the service and such last-mentioned day."

Panels and Return to Precept.

The jury panels are the lists of jurors selected by the sheriff, and are, therefore, in that sense connected with his summoning the jurors. It is, however, deemed advisable to place the subject of "panels" under a separate and subsequent head to that of "summoning" the jurors, and in conjunction, moreover, with the sheriff's return to the precept.

By the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 14, it is enacted, "That every sheriff, upon the receipt of every precept for the return of jurors, shall return the names of men contained in the jurors' book for the then current year, and no others:— Provided always, that if there shall be no jurors' book in existence for the current year, it shall be lawful to return jurors from the jurors' book for the year preceding."

Juries to be returned from jurors' book by sheriff.

Sect. 21 provides that a copy of the panel shall be delivered to persons indicted for high treason, subject to certain exceptions therein mentioned, ten days before the trial. Similar provisions are also made by 7 & 8 Will. 3, c. 3, s. 7; 7 Anne, c. 21, s. 14; and 3 Geo. 3, c. 53, s. 3.

Copy of panel to be delivered to parties indicted for high treason.

Judges of assize, &c., by sect. 22, may direct the sheriff to summon and impanel jurors to serve indiscriminately on the civil and criminal sides.

Judges of assize, &c., may direct same panel for civil and criminal sides.

By sect. 39, the sheriff is indemnified for impanelling and returning any man named in the jurors' book, although he may not be qualified or liable to serve on juries; but the sheriff is liable to be fined by the Court if he wilfully impanel and return any man to serve on any jury before any of the courts in England or Wales (except on the grand jury at any assizes or great sessions) whose name is not in the jurors' book.

Sheriff indemnified in returning any unqualified person named in jurors' book.

The sheriff is not entitled to exempt anyone from service, and in some places a notice to that effect is added to the summons. It is not, however, unusual for the undersheriff to excuse attendance for good cause shewn, provided the panel be not made up and the juror undertakes to serve on a future occasion when summoned; but in such case the undersheriff should keep in view the minimum number of jurors required for the panel.

Sheriff not entitled to exempt anyone from service.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sect. 106, "A printed panel of the jurors summoned shall, seven days before the commission day, be made by the sheriff, and kept in the office for inspection; and a printed copy

Printed panels of common and special jurors to be prepared by sheriff and

annexed to
record.

of such panel shall be delivered by the sheriff to any party requiring the same, on payment of one shilling; and such copy shall be annexed to the Nisi Prius Record." A similar provision as to the printing of the panel seven days before the first day of each sittings, &c., is made by sect. 107 with regard to the sheriffs of London and Middlesex. By sect. 108, "A printed panel of the special jurors shall be made, kept, delivered, and annexed to the Nisi Prius Record, in like time and manner and upon the same terms as hereinbefore provided with reference to the panel of common jurors." A similar provision is made as to London and Middlesex by the Juries Act, 1870 (33 & 34 Vict. c. 77), sect. 16. Touching the above-mentioned printed copies of the jury panels, the undersheriff should promptly furnish his London agents with a supply of such copies (say twelve each of the special and common jury panels) in connection with causes entered in London, it being necessary to attach copies of such panels to the pleadings.

Officer or
servant of
sheriff not to
be returned
in panel.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), sect. 12, "A sheriff or any officer of a sheriff shall not return in any panel for an inquest or jury any officer or servant of the sheriff or of such officer."

Sheriff's
return to
precept.

The sheriff's return to the precept consists of the following panels, viz. :—

- (1.) The precepts of the judges and clerk of assize duly endorsed in the forms (a) and (b) *infra*.
- (2.) The names of persons summoned to serve on the grand jury, with their places of abode, &c., in form (c) *infra*.
- (3.) The names of persons summoned to serve on the special and petty juries with names alphabetically arranged in forms (d) and (e) *infra*.
- (4.) The names of the magistrates, mayors, coroners, escheators, stewards, chief constables, bailiffs of hundreds and liberties, and sheriffs' officers of the different hundreds, as also the names of the sheriff and the governor of the gaol, in form (f) *infra*. In the case of a city or borough or county of a town add the names of the town clerk and coroner, and in that of a county of a city or town having any civil or criminal jurisdiction, add the name of the recorder.

In the case of quarter sessions, it is not customary for the sheriff to endorse any formal return on the precept. The jury panels are annexed thereto and handed over by the undersheriff

at the opening of the court, this being considered a sufficient return.

The following are suitable forms of return to the precepts: — Forms of
return.

(a) *To be endorsed on back of Judge's Precept.*

The county [or city] of . Assizes, 18 .
The return of this precept appears in certain panels hereto annexed.

——— Esquire
High Sheriff [or Sheriff].

Or,

By virtue of this precept to me directed I have caused to come before the justices within named and their fellow justices within mentioned 24 as well knights as other good and lawful men of my bailiwick to do and receive all things which on behalf of our Lady the Queen shall be then and there enjoined them as within I am commanded. The residue of the execution of this precept appears in a certain panel to the same annexed.

The answer of
——— Esquire
Sheriff.

(b) *To be endorsed on back of Clerk of Assize's Precept.*

The execution of this precept appears by the panels hereunto annexed. And I have caused to be publicly proclaimed throughout my whole bailiwick that all who shall prosecute against those prisoners be then and there to prosecute against them as shall be just. I have also given notice to all justices of the peace, mayors, coroners, escheators, stewards and also to all chief constables and bailiffs of every hundred and liberty within my county that they be then and there in their own person with their rolls, records, indictments and other remembrances to do those things which to their offices in this behalf appertain to be done as is within commanded. The residue of the execution of this precept appears in certain schedules to the same annexed.

The answer of
——— Esquire
Sheriff.

(c) *Grand Jury Panel for Assizes.*

The county [or city] of	,	Assizes 18 .
County of	}	The names(r) of the jurors to enquire between
[or		Our Sovereign Lady the Queen and the body of
City of	}	the said county.
To wit.		

(Foreman) 1 of Esquire
2 of Esquire

[and so on up to 24]

——— Esquire
Sheriff.

(r) As to the order in which the names of the grand jury should appear on the panel, see *ante*, p. 456.

Or,

Names (r) of the grand jurors to enquire for Our Lady the Queen for the body of the county of _____ at the assizes and general session of oyer and terminer and gaol delivery to be holden at the Courts _____ in and for the county [or city] of _____ on the _____ day of _____ 18 _____ before [and] [one of] the judge[s] of Her Majesty's High Court of Justice assigned to deliver her gaol of the said county.

(Foreman) 1 of Esquire
 2 of Esquire
 [and so on up to 24]

——— Esquire
 Sheriff.

(d) *Special Jury Panel for Assizes.*

County of _____ } A panel of jurors to try the Special Jury
 [or City of _____] } Causes at the Assizes to be holden at the
 To wit. _____ } Courts _____ in and for the county [or city]
 of _____ on the _____ day of _____ 18 _____ before [and]
 [one of] the judge[s] of Her Majesty's High Court of
 Justice and others his [or their] fellow justices.

	(Name)	(Address)	(Occupation)
1			
2			
3			

[and so on up to 48]

Issues on every one of them One hundred shillings

——— Esquire
 Sheriff.

By sect. 12 of the Jurors Act, 1870, it is enacted as follows:—
 “No person whose name shall be in the Jury Book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness not claimed by him at or before the revision of the list by the Justices of the Peace.”

(e) *Common Jury Panel for Assizes.*

County of _____ } A panel of jurors for the trial of all issues
 [or City of _____] } whether civil or criminal which may come on
 To wit. _____ } for trial at the Assizes to be holden at the
 Courts _____ in and for the county [or city] of _____ on the
 day of _____ 18 _____ before [and] [one of] the

(r) As to the order in which the names of the grand jury should appear on the panel, see *ante*, p. 456.

judge [s] of Her Majesty's High Court of Justice and others his
[or their] fellow justices.

	(Name)	(Address)	(Occupation)
1			
2			
3			

[and so on up to 72(s)]

Issues on every one of them One hundred shillings

———— Esquire
 Sheriff.

By sect. 12 of the Jurors Act, 1870, it is enacted as follows:—
“No person whose name shall be in the Jury Book as a juror shall
be entitled to be excused from attendance on the ground of any
disqualification or exemption other than illness not claimed by him
at or before the revision of the list by the Justices of the Peace.”

(f) *Calendar of Justices of the Peace, &c.*

County of } A calendar of the justices of the peace,
To wit. } mayors, coroners, escheators, stewards, chief
constables and bailiffs of hundreds and liberties within the county
of summoned to be at the assizes and session of oyer and
terminer and gaol delivery to be holden at in and for the
said county of on the day of in the
year of the reign of Our Sovereign Lady Victoria by the grace of
God of the United Kingdom of Great Britain and Ireland, Queen,
Defender of the Faith.

The Names of the Justices.

_____	}	Baronets

_____	}	Knights

_____	}	Esquires

_____	}	Clerks

The Names of the Coroners.

_____	}	Esquires

The Names of the Stewards of Liberties.

(s) See sect. 15 of the County Juries Act, 1825. It is, however, usual
to only summon up to 48.

The Names of the Mayors.

_____ Mayor of _____
 _____ Mayor of _____

The Name of the Chief Constable of the County.

The Names of the Sheriff's Bailiffs.

The Governor of Her Majesty's Prison at _____

_____ Esquire
 High Sheriff.

The clerk of the peace supplies the list of magistrates, and in some places the names of the coroners and the bailiffs are written on a separate piece of parchment, and annexed to the panels and precepts as follows:—

(g) List of Coroners and Bailiffs.

	County of	Assize 18 .
<i>Names of Coroners.</i>		<i>Names of Bailiffs.</i>
.....		
.....		
.....		

(h) List of Magistrates and Officials.

The City of _____,
 _____ Assizes, 18 .

Mayor
Sheriff
Coroner
Recorder
Town Clerk
Under Sheriff

Justices of the Peace.

_____ Esquire
 Sheriff.

Panels, how
 to be drawn
 up, and to
 whom de-
 livered.

The panels are to be attached to the precept and should be made on parchment. They may either be in writing or printed. The sheriff himself should hand the precept with the return

duly endorsed and such annexed panels to the judge on the opening of the commission. Paper copies are delivered to the judge's associate and the clerk of assize in civil cases.

(k) *Grand Jury Panel for Sessions.*

— Sessions 18 .

County of } The names of the jurors to enquire between
to wit. } Our Sovereign Lady the Queen and the body of
the said county at the General Quarter Sessions of the Peace to be
holden at the , on day, the day of
18 .

Number	Grand Jurors
1	of Esquire
2	of Esquire
3	of Esquire
4	of Esquire
5	of Esquire
[&c. up to 24]	
	— Esquire Sheriff.

(l) *Petty Jury Panel for Sessions.*

— Sessions 18 .

County of } The names of the jurors to enquire between
to wit. } Our Sovereign Lady the Queen and the prisoners
of the said county at the General Quarter Sessions of the Peace to
be holden at the , on day the day of
18 .

Number	Petty Jurors	Occupation.
1	of	
2	of	
3	of	
4	of	
5	of	
[&c. up to 72(t)]		
	— Esquire Sheriff.	

(t) See sect. 15 of the County Juries Act, 1825. It is, however, customary only to summon up to 48.

Arrival of the Judge or Judges, &c.

Interpretation
of expres-
sions.

It will be observed that in dealing with this branch of his subject the writer refers throughout to the case of county and city assize, hereafter for brevity called "a joint assize," and that he alludes to "a judge or judges." His reason for this, with regard to such joint assize, is that, on the general principle of the greater including the less, the reader can the more readily ascertain the requisite duties, precedence, &c. in the case of a county or city assize, whilst the reference to "a judge or judges" arises from the fact that at certain assizes only one judge attends, and at other assizes two judges. (See foot-note, *ante*, p. 445.) Again, the word "city" has been used throughout for convenience; but in cases where assizes are held for counties of towns or boroughs, the words "town" or "borough" must be substituted.

Undershe-
riff's duties
on receipt of
precept.

The undersheriff is, on his receipt of the judge's precept, generally informed by the clerk of assize of the dates of the judge or judges' intended arrival, opening of the commission, and first sitting in Court. The undersheriff should, for his guidance in connection with the jurors' attendance, communicate with the associate as to the days on which it is intended to take common and special jury causes. The judge's associate sometimes, too, requests the undersheriff to publish any particular regulations for trial, which the judge or judges may desire enforced at the ensuing assizes.

On his receipt of the above precepts, the undersheriff should—

- (a) Inform his high sheriff and the governor of the gaol, to whom he should also supply the proper titles of the judge or judges, or, in the case of a city, his sheriff and the mayor and any other municipal authority, like the town clerk, whom it may be customary to keep informed of the assize arrangements.
- (b) Provide for the high sheriff's carriage to take the high sheriff and himself, or, in the case of a city, the sheriff's or mayor's carriage (whichever it may be customary to use), to take his sheriff, as also, in the case of a city, the mayor and himself to meet the judge or judges on their arrival.
- (c) Arrange any church service the judge or judges may require on arrival, first having communicated with the judge's clerk for such purpose.

- (d) Provide for the requisite police guard on the judges' arrival (*u*), and mounted police escort during the assize.
- (e) Engage and see to the proper clothing and equipment of the sheriff's trumpeters, liveried servants, and, where used, javelin men. By 22 & 23 Vict. c. 22, s. 18, justices may direct police to keep order in Court of Assize to the consequent exoneration of the high sheriff providing any javelin men or other liveried men servants at the assizes. It is, nevertheless, customary for the sheriff to have suitable liveried men servants.
- (f) See to the judges' lodgings being ready for them on their reception (*x*).
- (g) Provide stationery, &c. for the Courts, and judges' lodgings.

On the arrival of the judge or judges at the station, the high sheriff, in the case of a joint assize, takes precedence over the mayor and city sheriff on the platform. The following may be taken as the proper order of procession between the station platform and carriages, viz. :—

Order of precedence on arrival of judges.

Criers and attendants.

County and city undersheriffs.

Mayor.

City sheriff.

High sheriff's chaplain (*y*) (where there is one).

High sheriff.

Judge or judges.

Opening of the Commission.

The judge or judges may open the commission either on their arrival or defer doing so till the following morning, proceeding in the latter case immediately afterwards with the business of the assize. If the county commission is, in the case of a joint

Opening of the commission.

(*u*) In Ireland the undersheriff sends in a requisition to the police and military to attend at a particular time to receive the judges.

(*x*) At Newcastle-upon-Tyne and Bristol board is also provided for the judges by the corporation, but these would seem to be the only places where this is done.

(*y*) It is customary for the high sheriff to provide his chaplain's robes.

assize, opened first, the judge or judges are taken by the high sheriff and his undersheriff in the high sheriff's carriage from the station to the judges' lodgings and then to the Courts (z). If on the other hand the city commission is first opened, then the city sheriff with his undersheriff takes charge of the judge or judges for a like purpose (a), and when the city commission is opened, the city sheriff hands over the judge or judges to the high sheriff. The judge or judges always sit facing the horses, and the other occupants of the carriage must sit opposite and remain uncovered.

The judge or judges either robe at the station on arrival or at their lodgings according to the time at their disposal, and it is desirable for the undersheriff to previously ascertain their intentions as to this from their clerks so as to arrange accordingly.

In the case of the county commission, the high sheriff sits on the right of the presiding judge and the undersheriff on his right; and in the case of the city commission, the city sheriff sits on the right, the mayor on the left, of the presiding judge, and the city undersheriff on the right of the city sheriff.

On reaching the bench, all in Court stand up until the proclamation is read, and the clerk of assize asks the high or city sheriff (as the case may be) for his return to the judge or judges' precept, which return, prepared as previously mentioned and neatly rolled up, the undersheriff hands to the sheriff, by whom it is handed to the judge or judges.

The commission is then formally opened.

Swearing and
charging
grand jury.

After the opening of the commission, the first thing is to call over and swear in the grand jury, county or city. The presiding judge then charges the county and city grand juries, the grand jurors standing during the delivery of the charge.

Church Services.

Where held.

A church service must, if desired, be arranged for the judge or judges. The church must be one within the precincts and is usually the principal church of the place.

(z) Where the high sheriff has a chaplain the latter only accompanies the high sheriff, the undersheriff in such case following in the most convenient manner.

(a) The city undersheriff only occupies a seat in the carriage if there be room for him through the mayor's absence.

The order of procession from the entrance of the church to the seats allotted to the judges and dignitaries is the same as that adopted on the judges' arrival. The judge or judges should sit in the principal seat or seats, with the high sheriff on the left of the judge, or of the junior judge if there are two judges, the county undersheriff on the high sheriff's left, and the mayor and city sheriff and undersheriff on the right of the judge, or of the senior judge if two judges (*b*).

Order of procession and seating arrangements.

In the case of what is generally known as "Assize Sunday," subject to different customs at different places with regard to the position in the procession of the clergy, choir, and churchwardens, the following order of procession is not unusual on the occasion of a joint assize, viz. :—

Order of procession on Assize Sunday.

Choir.
 Officiating clergy.
 Churchwardens.
 County undersheriff.
 High sheriff.
 Chaplain (where there is one).
 City undersheriff.
 City sheriff.
 Mayor.
 Judge or judges.

Attendance at Court, &c. during Assize Business.

On each day of the assize whilst the county or city business is being taken, the county or city sheriff, according to whether county or city business be taken, must attend with his undersheriff, and in the case of the city business, the mayor also, each morning at the appointed time with his carriage at the judge or judges' lodgings for the purpose of taking the judge or judges to the Court. Where there are two judges it is customary, in the case of a joint assize, for the mayor to place his carriage also at the judges' disposal throughout the assize. Where there is a county and city jurisdiction it is not unusual for the sheriffs to divide this duty. The carriage, preceded by the trumpeters and

Attendance of sheriff, undersheriff, &c. on judges to and from courts.

(*b*) Such appears to be the ordinary relative position, but it may vary in different places.

javelin men, if any, and generally with a mounted police escort, proceeds to the Court at a walking pace. On arrival at the Court the order of procession is on the same principle as that previously indicated, viz. :—

Attendants (if any).

Undersheriff.

Chaplain (where there is one).

High or city sheriff (as the case may be).

Mayor (in case of city work).

Judge or judges.

During the early part of each afternoon the undersheriff should ascertain from the judge or judges at what hour the carriage should be ordered for his or their return to the lodgings, and provide for the same accordingly. On the rising of the Court at the end of each day, the judge or judges must be escorted to their lodgings in a similar manner to that in which they were escorted to the Court, except that the attendants do not generally then accompany the carriage.

Attendance
in Court of
sheriff, under-
sheriff, &c.

The sheriff, or his undersheriff, must be in constant attendance on the bench throughout each day of the assize, and the high sheriff's chaplain, where there is one, should attend the sheriff in Court so long as Crown business is going on. The undersheriff must be in constant attendance, or within call, for the purpose of looking after the jurors, and attending to any directions as to the juries and otherwise of the clerk of assize or judge's associate. This is done primarily through the sheriff's bailiff. Amongst other things, the undersheriff has to provide for jurors' views where ordered. (See *post*, p. 482.) He is also responsible for juries being locked up where the latter wish to retire to consider their verdict, and he must also provide jurors with fire and refreshment where ordered. (See *post*, p. 483.)

Employment
of police
constables or
men servants
to keep order,
&c.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), sect. 9: "In the time of the assizes a court of quarter sessions in the county (which by sect. 38 includes general sessions) may direct a sufficient number of police constables to be employed to keep order in and within the precincts of the Court of Assize, and the chief constable shall comply with such direction, but if such direction is not given the sheriff shall have a sufficient number of men servants in liveries attending upon him for the purpose of so keeping order and of protecting the judges of assize." This provision is evidently in lieu of that relating to sheriffs' men servants, &c. contained in 14 Car. 2, c. 21, the whole of

such latter Act, so far as then subsisting, having been repealed by the Sheriffs Act, 1887. By sect. 36 of this Act, as regards its application to sheriffs of counties of cities and counties of towns, any jurisdiction by the Act vested in the justices in general or quarter sessions may be exercised, so far as regards constables, by the council. Sub-sect. 4 of sect. 33 provides that the Act shall not apply to the sheriff of Middlesex and the sheriffs of London as regards the maintenance of men servants.

Jurors' Fines for Non-attendance.

By sects. 38 and 51 of the County Juries Act, 1825 (6 Geo. 4, c. 50), provision is made for fining jurors on making default; but by the Juries Act, 1862 (25 & 26 Vict. c. 107), sect. 12, fines may be remitted upon cause shown. Sect. 20 of the Juries Act, 1870 (33 & 34 Vict. c. 77), provides that no juror is liable to any penalty for non-attendance on any jury unless he receive the six days' notice to which he is entitled.

Making up Deficiency of Jurors.

By the County Juries Act, 1825 (6 Geo. 4, c. 50), sect. 37, it is provided: "That where a full jury shall not appear before any Court of Assize, or before any of the Superior Civil Courts of the three Counties Palatine, or before any Court of Great Sessions, or where, after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, every such Court, upon request made for the king by anyone thereto authorized or assigned by the Court, or on request made by the parties, plaintiff or demandant, defendant or tenant, or the respective attorneys, in any action or suit, whether popular or private, shall command the sheriff or other minister, to whom the making of the return shall belong, to name and appoint, as often as need shall require, so many of such other able men of the county then present as shall make up a full jury; and the sheriff or other minister aforesaid, shall, at such command of the Court, return such men duly qualified as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel, provided

**Jurors' fines
for non-
attendance.**

**Deficiency of
jurors may be
made up from
persons
present.**

that where a special jury shall have been struck for the trial of any issue, the talesmen shall be such as shall be impanelled upon the common jury panel to serve at the same Court, if a sufficient number of such men can be found ; and the king, by anyone so authorized or assigned as aforesaid, and all and every the parties aforesaid, shall and may, in each of the cases aforesaid, have their respective challenges to the jurors so added and annexed, and the Court shall proceed to the trial of every such issue with those jurors who were before impanelled, together with the talesmen so newly added and annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue." See on this subject Shortt and Mellor's Practice of the Crown Office, p. 217.

Balloting for Juries.

Juries at
assizes, &c.,
how balloted
for.

Sect. 26 of the County Juries Act, 1825 (6 Geo. 4, c. 50), enacts: "That the name of each man who shall be summoned and impanelled in any Court of Assize, or for the trial of issues in the Civil Courts of the Counties Palatine or Great Sessions, with the place of his abode and addition, shall be written on a distinct piece of parchment or card, such pieces of parchment or cards being all as nearly as may be of equal size, and shall be delivered unto the associate or prothonotary of such Court by the undersheriff of the county, or the Secondary of the City of London, and shall, by direction and care of such associate or prothonotary, be put together in a box to be provided for that purpose ; and when any issue shall be brought on to be tried, such associate or prothonotary shall in open Court draw out twelve of the said parchments or cards one after another, and if any of the men whose names shall be so drawn shall not appear, or shall be challenged and set aside, then such further number, until twelve men be drawn, who shall appear, and after all just causes of challenge allowed, shall remain as fair and indifferent ; and the said twelve men so first drawn and appearing, and approved as indifferent, their names being marked in the panel, and they being sworn, shall be the jury to try the issue, and the names of the men so drawn and sworn shall be kept apart by themselves until such jury shall have given in their verdict, and the same shall be recorded, or until such jury shall, by consent of the parties or by leave of the Court, be

discharged, and then the same names shall be returned to the box, there to be kept with the other names remaining at the time undrawn, and so *toties quoties*, as long as any issue remains to be tried: Provided always, that if any issue shall be brought on to be tried in any of the said Courts before the jury in any other issue shall have brought in their verdict or been discharged, it shall be lawful for the Court to order twelve of the residue of the said parchments or cards, not containing the names of any of the jurors who shall not have so brought in their verdict or been discharged, to be drawn in such manner as is aforesaid, for the trial of the issue which shall be so brought on to be tried." This section further provides that the same jury, if not objected to, may try several issues in succession without being redrawn.

Same jury
may try several issues.

Sect. 108 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), provides, with regard to special juries at assizes, that "upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box in the same manner as common jurors: Provided that the Court or a judge, in such case as they or he may think fit, may order a special jury to be struck according to the present practice, and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause."

Special juries
at assizes, how
balloted for.

By sect. 110 of the same Act, "In London and Middlesex special jurors shall be nominated and reduced by and before the under-sheriff and secondary respectively, in like manner as by the master before this Act, upon the application of either party entitled to a special jury, and his obtaining a rule for such purpose; and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors." By sect. 16 of the Juries Act, 1870 (33 & 34 Vict. c. 77), special juries for London and Middlesex are to be provided in the same manner as in other counties, and upon the trial the special jury shall be balloted for and called in the order in which they are drawn from the box in the same manner as common jurors. Sect. 17 provides for the abolition of the practice of nominating and reducing special jurors in London and Middlesex as regards the trial of any cause at any of the sittings of the superior Courts, subject to this proviso, viz.: "That any of the said superior Courts or any judge thereof may if it seem expedient order that a

Special juries
in London
and Middle-
sex, how bal-
loted for.

special jury be struck according to the present practice, and such order shall be a sufficient warrant for striking such jury and making a panel thereof for the trial of the particular cause."

Jurors' View.

Order for view may be drawn up without motion.

Sheriff or jury cannot be ordered to view in another county.

Court may order sum to be deposited to cover expenses.

The order for a view is one of the orders of course which, according to Rule 252 of the Crown Office Rules, 1886, may be drawn up at the Crown Office without any motion for the same.

The Court cannot, even by consent, order a view in one county by a sheriff of another, neither can the Court compel a jury to go out of the limits of a county for such a purpose. *Malins v. Dunraven*, 9 Jur. 690.

By the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 23, where jurors are to view lands, &c., "the Court, or any judge thereof in vacation, may order a rule to be drawn up, containing the usual terms, and also requiring, if such Court or judge shall so think fit, the party applying for the view to deposit in the hands of the under-sheriff a sum of money to be named in the rule for payment of the expenses of the view."

Costs of view.

By Rule 159 of the Crown Office Rules, 1886, "Upon any application for a view there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the office of the under-sheriff, and the sum to be deposited with the under-sheriff shall be ten pounds in case of a common jury, and sixteen pounds in case of a special jury, if such distance do not exceed five miles, and fifteen pounds in case of a common jury, and twenty-one pounds in case of a special jury, if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the solicitor of the party who obtained the view. If such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such solicitor to the under-sheriff, and the under-sheriff shall pay and account for the money so deposited, according to the scale at the end of the Appendix to these Rules" (c).

Sheriff to deliver names of viewers to

By sect. 114 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), when a rule of the Court or a judge's

(c) As to which see under title "Sheriff's Fees, &c.," *post*, p. 512.

order, directing a view to be had, has been obtained, "the sheriff, upon request, shall deliver to either party the names of the viewers, and shall also return their names to the associate for the purpose of their being called as jurymen upon the trial."

associate, and to parties, if required.

Sect. 24 of the County Juries Act, 1825, provides, "That where a view shall be allowed in any case, those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn, and so many only shall be added to the viewers who shall appear as shall, after all defaulters and challenges allowed, make up a full jury of twelve."

Viewers to be sworn upon jury first.

By sect. 46 of the Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), "Where a cause, in which her Majesty's attorney-general on behalf of the Crown is entitled to demand as of right a trial at bar, is at any time depending in any of her Majesty's superior courts of law at Westminster, whether instituted before or instituted after the commencement of this Act, and the attorney-general states to the Court that he waives his right to a trial at bar, the following provisions shall have effect:—(1) The Court, on the application of the attorney-general, shall change the venue to any county in which the attorney-general elects to have the cause tried: (2) The Court may (if requisite) order that the sheriff of the county into which the venue is removed do cause a view to be had by jurors of that county (notwithstanding that the view must be taken and had by such sheriff and jurors out of their own county): (3) For the purposes aforesaid the Court may make such orders as seem necessary or proper; and all such orders shall be binding on all sheriffs and other officers, and on all jurors and other persons concerned, and shall be sufficient warrant for the doing of everything thereby authorized or directed to be done: (5) Subject to any such rules, the provisions of the Common Law Procedure Act, 1852, and of any rules made under it, and all other law and practice for the time being in force relative to change of venue and to views, shall extend to the cases of change of venue and view to which this section relates."

View in case of Crown suits.

Jurors' Fire and Refreshment.

As already indicated, it is the under-sheriff's duty to provide the jury with refreshment, where ordered, and common jurors

Jurors may be allowed fire and refreshment.

are generally ordered refreshment in criminal cases during the Court's adjournment for luncheon. By the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 23, "Jurors, after having been sworn, may, in the discretion of the judge, be allowed at any time before giving their verdict the use of a fire when out of court, and be allowed reasonable refreshment, such refreshment to be procured at their own expense."

It appears to be the practice in some places, when a jury is detained on a case over the adjournment, to order luncheon for them from a neighbouring inn, and the cost is subsequently recovered from the Treasury on the passing of the bill of cravings, on presentation of the receipted account with a certificate signed by the clerk of assize that luncheon was ordered by the Court. This bill is generally taxed down to twelve shillings.

Jurors' Remuneration.

For serving
on jury.

By the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 22, jurors are entitled to the remuneration for their services therein mentioned, but by the Juries Act (1870) Amendment Act (34 Vict. c. 2), that section of the Juries Act, 1870, is repealed subject to the proviso "that nothing in this Act, or in the Juries Act, 1870, shall affect any claim, right, or title to payment which any juror would have had in case neither of the said Acts had been passed." As to the old law on the subject, by the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 35, "No juror who shall serve upon any special jury shall be allowed or take for serving on any such jury more than such sum of money as the judge who tries the issue shall think just and reasonable, and which shall not exceed the sum of one pound one shilling, except in causes wherein a view is directed, and shall have been had by such juror." There appears to be no provision for payment of common jurors, although it seems customary in some places to pay them. The amount of such allowance apparently varies.

For view.

In the case of a view, special jurors are, in addition to their one guinea a day, allowed five shillings per day for refreshments and also reasonable travelling expenses, and it seems usual to pay common jurors five shillings per day, and a like daily sum for refreshments, as also reasonable travelling expenses. For

scale of fees to be taken on a view, see rule 159 of Crown Office Rules, 1886 (*d*), *ante*, p. 482. The sheriff is entitled and should require from the party at whose instance the view is ordered, a deposit for its execution, and whether the jury be special or common, such deposit is to be assessed according to distance.

Jurors receive their fees through the under-sheriff from the party entering the cause for trial, such fees being payable after they are sworn, and being paid then or during the hearing or on the termination of the cause. Moreover, it is conceived that the mere disagreement and discharge of the jury without giving a verdict should not affect their right to their fees (*e*). It appears that the under-sheriff is not, and should not make himself, in any way responsible for jurors' fees.

By whom
paid.

Sheriff's Certificate of Jurors' Attendance.

By the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 40, "The sheriff, or his under-sheriff, shall from time to time register alphabetically, in proper columns to be prepared in the jurors' book for that purpose, the services of such men as shall be summoned and shall attend to serve as jurors on trials before any court of assize, or in the said courts of the said Counties Palatine or Great Sessions, and also the times of their services; and every man so summoned, and having duly attended or served until discharged by the Court shall (upon application by him made to such sheriff or under-sheriff, before he shall depart from the place of trial), receive a certificate testifying such his service, which certificate the sheriff or under-sheriff is hereby required to give on payment of one shilling: Provided always that nothing herein contained shall extend to any grand jurors or special jurors."

Sheriffs, &c.
to register
names of
jurors who
have served
at assizes, and
give certi-
ficates.

Exception as
to grand and
special jurors.

(*d*) The under-sheriff of Yorkshire, however, considers that the allowances to the under-sheriff, jurors, and shewers on a view, ought to be given according to the table from the old Rules (Hilary, 1853).

(*e*) In a case, however, where the jurors disagreed and were discharged without giving a verdict, the under-sheriff was advised by the judge trying the action, that they were not entitled to their fees, and consequently nothing was paid them.

Form of Certificate.

Sheriff's Office _____ 18 .

I certify that _____ of _____ in the county of _____, served as a petty juror on the _____ day of _____ 18 _____ at the trial of _____ for _____ and I hereby exempt the said _____ from serving as a juror for two years from this date.

_____ Esquire,
(*Seal of Office.*) Sheriff of _____.

Sheriff to re-
gister names
of jurors who
have served
at sessions.

By sect. 41 the clerk of the peace is to make out a list of all who have served at sessions on grand or petty juries and transmit the same "to the sheriff or under-sheriff of the county, who is hereby required forthwith to register the names of the men included in such list in the proper columns of the jurors' book for that purpose, together with the date of their services."

Sheriff's Jury, and other Assize Expenses.

Expenses of
summonses.

By sect. 13 of the Juries Act, 1862 (25 & 26 Vict. c. 107), "The costs incurred by any sheriff in summoning jurors by post, under the provisions of this Act, so far as the same shall not exceed the sum allowed to such sheriff, or his predecessor in office, on that account, in any one year within the three years immediately preceding the passing of this Act, may be included in his ordinary bill of cravings, and shall be allowed by the Treasury."

Other assize
expenses.

The sheriff pays all criers, trumpeters, and other like officials, and should take receipts for all his assize payments, as vouchers are required in rendering the bill of cravings.

Penalties on Sheriff for Neglect of Duty.

By the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 46, penalties are reserved on sheriffs, under-sheriffs, and others neglecting their duty.

Sheriff's Fees.

See under title "Sheriff's Fees, &c.," *post*, p. 505.

Sheriff's Assize and Sessions Accounts.

See under title "Sheriff's Accounts," *post*, p. 520.

CHAPTER XXIX.

CRIMINAL EXECUTION.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 13, sub-s. 1, it is enacted that: "Where judgment of death has been passed upon a convict at any court of assize or any sessions of oyer and terminer or gaol delivery held for any county or riding or division or other part of a county, the sheriff of such county shall be charged with the execution of such judgment, and may carry such judgment into execution in any prison which is the common gaol of his county or in which the convict was confined for the purpose of safe custody prior to his removal to the place where such Court was held, and shall, for the purpose of such execution, have the same jurisdiction and powers over and in the prison in which the judgment is to be carried into execution, whether such prison is or is not situate within his county, and over the officers of such prison, as he has by law over and in the common gaol of his county and the officers thereof, or would have had if the Prison Act, 1865, and the Prison Act, 1877, had not passed, and shall be subject to the same responsibility and duties as if the said Acts had not passed." Sub-sect. 2 provides that "This section shall be in addition to and not in derogation of any power authorized to be exercised by Order in Council under the Winter Assizes Act, 1876, and the Spring Assizes Act, 1879, or either of them, and of the provisions of the Central Criminal Court (Prisons) Act, 1881."

By whom and where judgment of death to be executed.

By the Central Criminal Court (Prisons) Act, 1881 (44 & 45 Vict. c. 64), s. 2, sub-s. 5, it is enacted that: "Where judgment of death is passed at the Central Criminal Court upon a person convicted of any offence, the judgment may be carried into execution in any prison in the Central Criminal Court district or in the county, if any, where the offence was committed or is supposed to have been committed, which the justice or judge of the said Court passing sentence, or any other justice or judge of the Court subsequently may order, and if no order is made, then in the prison in which the convict is for the time being confined; and such sheriff as is ordered by any justice or judge of the said

Court, or if no order is made, the sheriff of the county in which the offence was committed or is supposed to have been committed, or if the offence was committed or is supposed to have been committed on the high seas, or if the county in which the offence was committed does not clearly appear, the sheriff of Middlesex shall be charged with the execution of the judgment; and the sheriff charged with the execution of the judgment shall for that purpose have the same jurisdiction and powers and be subject to the same duties in the prison in which the judgment is to be carried into execution, although such prison is not situate within his county, as he has by law with respect to the common gaol of his county or would have had if the Prison Act, 1865, and the Prison Act, 1877, had not passed."

As to the execution of persons convicted at assizes for the county of Chester, see 30 & 31 Vict. c. 36, which is an Act to (*inter alia*) confer additional powers upon the sheriff of the county of Chester in exoneration of the sheriff of the city of Chester.

Intimation by governor of gaol to sheriff that prisoner awaits execution, &c.

It is customary for the governor of the gaol in which the prisoner is incarcerated to intimate to the sheriff that the prisoner has been received into his (the governor's) custody under sentence of death, and to furnish the sheriff with a memorandum of the instructions issued by the Secretary of State relative to executions, and which reads as follows:—"The sheriff being solely responsible for carrying into effect the sentence of death, and for this purpose, or for any purpose relating thereto, having by statute the control over the prisons and the officers thereof, whenever a governor receives a prisoner under sentence of death, he is forthwith to inform the sheriff of the fact, and to specify what means exist at the time in the prison for carrying out the sentence. The governor will invite the sheriff to inspect the apparatus and to test its operation so as to satisfy himself of its efficiency in every respect. He is also to inquire of the sheriff whether he desires any works to be done in the prison, either to improve the apparatus or to facilitate the carrying out of the execution, and if the sheriff answers in the affirmative the governor is to inform him that the responsibility rests with him and that he is at liberty, and it is his duty, to select and employ at his discretion proper workmen, and to direct them to carry out such works as he thinks necessary, but that the Prison Commissioners will offer all requisite facilities, and will if requested in due time place at his disposal all such labour and materials

as they have at their command free of cost (unless otherwise notified to him)."

The sheriff should, as soon as convenient after sentence of death has been pronounced, fix the date of execution and make all necessary arrangements for carrying such sentence into effect. One of the regulations made by her Majesty's Secretary of State, under powers reserved to him by sect. 7 of the Capital Punishment Amendment Act, 1868 (31 Vict. c. 24), for making regulations to be observed on the execution of judgment of death, is that, for the sake of uniformity, it is recommended that executions should take place in the week following the third Sunday after the day on which sentence is passed, on any week day but Monday, and at 8 a.m.

Date of execution to be fixed by sheriff.

It is usual for the sheriff to notify the proposed date of execution to the Home Office and to the judge who passed sentence, and such information should also be furnished by the sheriff to the coroner, to enable the latter to make arrangements for the inquest, which must be held within twenty-four hours after the execution.

Notification of date to Home Office, &c.

The prison authorities have nothing to do with providing the executioner. This must be done by the sheriff. The executioner generally provides his own rope and pinioning apparatus, but the governor of Newgate keeps a certain number of ropes suitable for executions, one of which can be furnished to the sheriff, if desired. The Secretary of State in a Circular dated 7th October, 1885, suggests that the sheriff should, to avoid public scandal, make it compulsory that the executioner should sleep in the prison as long as he may remain in the place where the sentence is to be executed, and certainly on the night preceding the execution. Moreover, the governors of prisons have instructions to provide quarters in the prison for the executioner at the request of the sheriff.

The executioner.

By the Capital Punishment Amendment Act, 1868 (31 Vict. c. 24), sect. 11, "The duties and powers by this Act imposed on or vested in the sheriff may be performed by and shall be vested in his under-sheriff or other lawful deputy acting in his absence and with his authority, and any other officer charged in any case with the execution of judgment of death."

Duties of sheriff as to execution may be performed by under-sheriff, &c.

By sect. 2 of the same Act, "Judgment of death to be executed on any prisoner sentenced after the passing of this Act on

Execution to take place within walls of prison.

any indictment or inquisition for murder shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution."

Persons to be present at execution.

By sect. 3, "The sheriff charged with the execution, and the gaoler, chaplain, and surgeon of the prison, and such other officers of the prison as the sheriff requires, shall be present at the execution. Any justice of the peace for the county, borough, or other jurisdiction to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the sheriff or the visiting justices of the prison proper to admit within the prison for the purpose, may also be present at the execution." It is optional, therefore, with the sheriff to permit representatives of the press to be present.

Black flag to be hoisted and bell tolled.

A black flag must be hoisted at the moment of execution on a conspicuous part of the prison, and remain there one hour. The prison, parish, or other bell, must toll a quarter of an hour before and a quarter of an hour after the execution.

Surgeon to certify death, and declaration to be signed by sheriff, &c.

By sect. 4 of the Capital Punishment Amendment Act, 1868, "As soon as may be after judgment of death has been executed on the offender, the surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, and deliver the same to the sheriff. The sheriff and the gaoler and chaplain of the prison, and such justices and other persons present (if any) as the sheriff requires or allows, shall also sign a declaration to the effect that judgment of death has been executed on the offender."

Penalty for signing false certificate or declaration.

Sect. 9 provides that, "If any person knowingly and wilfully signs any false certificate or declaration required by this Act, he shall be guilty of a misdemeanor, and on conviction thereof shall be liable, at the discretion of the Court, to imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Form of Certificate of Surgeon.

I A. B. the surgeon [*or as the case may be*] of the [*describe prison*] hereby certify that I this day examined the body of C. D. on whom judgment of death was this day executed in the [*describe same prison*] and that on that examination I found that the said C. D. was dead.

Dated this day of 18 .

(Signed) A. B.

Form of Declaration of Sheriff and Others.

WE the undersigned hereby declare that judgment of death was this day executed on C. D. in the [*describe prison*] in our presence.

Dated this day of 18 .

(Signed) E. F. Sheriff of
 L. M. Justice of the Peace for
 G. H. Gaoler of
 I. K. Chaplain of
 &c. &c.

It seems that the sheriff sometimes sees the body cut down at the expiration of one hour (*a*), but this is not obligatory. Cutting down body.

By sect. 5 of the same Act, "The coroner of the jurisdiction to which the prison belongs wherein judgment of death is executed on any offender shall within twenty-four hours after the execution hold an inquest on the body of the offender, and the jury at the inquest shall inquire into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender; and the inquisition shall be in duplicate, and one of the originals shall be delivered to the sheriff." Coroner's inquest on body.

By sect. 6, "The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him; provided that if one of her Majesty's principal Secretaries of State is satisfied on the representation of the visiting justices of a prison that there is not convenient space within the walls thereof for the burial of offenders executed therein, he may, by writing under his hand, appoint some other fit place for that purpose, and the same shall be used accordingly." It is, however, not necessary for the sheriff to attend at the burial, which is always carried out by the prison authorities. Burial of body.

By sect. 10, "Every certificate and declaration and the duplicate of the inquisition required by this Act shall in each case be sent with all convenient speed by the sheriff to one of her Majesty's principal Secretaries of State, and printed copies of the same several instruments shall as soon as possible be exhibited and shall for twenty-four hours at least be kept exhibited on or near the principal entrance of the prison within which judgment of death is executed." Certificate, &c. to be sent to Secretary of State and exhibited at prison entrance.

(*a*) See evidence given before the House of Lords Committee on High Sheriffs.

Saving clause in 31 Vict. c. 24, as to legality of execution.

By sect. 15, "The omission to comply with any provision of this Act shall not make the execution of judgment of death illegal in any case where such execution would otherwise have been legal."

Application of 31 Vict. c. 24, to Ireland.

By sect. 14, "In the application of this Act to Ireland the expressions 'Chief Secretary to the Lord Lieutenant,' and 'Board of Superintendence,' shall be substituted for the expressions 'one of her Majesty's principal Secretaries of State,' and 'Visiting Justices,' respectively."

Executioner's fee.

No fees are allowed by the Treasury to the sheriff in connection with criminal executions, except the executioner's fee, generally 10*l.*, and also, it seems, his second class return railway fare. It would appear, however, that no such allowance is made to Irish high sheriffs (*b*).

Suspension of execution by reprieve.

The execution may be suspended for a time by a reprieve, which is the temporary withdrawing of a sentence. Reprieves may be granted *ex mandato regis*, at the mere pleasure of the Crown; *ex arbitrio judicis*, either before or after judgment; or *ex necessitate legis*, in which case the Court is bound to grant a reprieve. There are two cases of reprieves *ex necessitate legis*, viz.: (1) where the prisoner after judgment becomes insane; and (2) where a woman is capitally convicted and pleads her pregnancy. With regard to the latter case, Sir W. Blackstone says: "This is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis*. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact, and if they bring in their verdict *quick with child* (for barely *with child*, unless it be alive in the womb, is not sufficient) execution shall be stayed generally till the next session; and so from session to session, till either she be delivered or proves by the course of nature not to have been with child at all." It seems that the jurors in this case must be summoned and are to be afforded the same treatment during their examination and deliberations as jurors in other cases.

(*b*) See evidence given before the House of Lords Committee on High Sheriffs.

CHAPTER XXX.

LIABILITY AND RIGHTS OF SHERIFF AND REMEDIES AGAINST
SHERIFF.

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I.—LIABILITY OF AND PROCEEDINGS AGAINST SHERIFF.

Introductory.

WHEN acting in a ministerial capacity and subject to his under-mentioned exemption from penalties for any innocent mistake, the sheriff is in general liable in respect of any damage sustained by a third party from his (the sheriff's) misfeasance, or that of his officer in cases "where there is a misdoing of something which he [the sheriff] commands him to do; [and] if the sheriff is sued for a misfeasance of his officer, it is no answer for him to say that his command was not obeyed; he is still liable, provided the thing done be something which by the command and under the authority of the sheriff the officer was bound to do. The reason that the sheriff is held liable [for his officer's misfeasance] is that, having a duty imposed upon him by law, instead of performing it himself, he delegates it to another, and, therefore, it is but just that he should be responsible for the misconduct of those to whom he so delegates the performance of his duty." *Per Maule, J., in Smith v. Pritchard*, 8 C. B. 588. "There is no doubt that in all matters relating to the execution the sheriff's officer is the same as the sheriff."

Liability for
damage
through
misfeasance.

Per Lord Wenman, C.J., in *Raphael v. Goodman*, 8 Ad. & E. 570. Again, to quote Littledale, J., in the last-mentioned case, "He [the sheriff] is himself identified with the officer, as is clear from all the cases, except where, as in *Crowder v. Long*, 8 B. & C. 598, the party opposed to the sheriff is colluding with the officer," or, it seems, induces him to depart from the ordinary course of his duty without the sheriff's knowledge.

Liability for wilful and fraudulent acts.

The sheriff is also, it seems, liable as well for wilful and fraudulent acts as for negligence. *Laycock's case*, Latch, 187, and *Woodgate v. Knatchbull*, 2 T. R. 148.

Liability for misconduct of officer.

The sheriff is, moreover, civilly liable for misconduct of his officer in executing a writ, though the act done be contrary to the express terms of the writ. *Smart v. Hutton*, 8 Ad. & E. 568. He is not, however, criminally answerable for acts of the under-sheriff unauthorized by him. Latch, 187.

Liability for acts of special bailiff.

As to the sheriff's liability for the acts of a special bailiff, see under title "Appointment of sheriff and his officers, &c. (bailiffs)," *ante*, p. 13.

Liability for wrongful imprisonment.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), sect. 15, "A person unlawfully imprisoned by a sheriff or any of his officers shall have an action against such sheriff in like manner as against any other person that should imprison him without warrant."

Remedy against sheriff for false return.

The Court will not try on affidavits whether the return made by a sheriff to a writ is false, even though a strong case is made out showing fraud and collusion, but the party must resort to his remedy by action. *Goubot v. de Crouy*, 2 D. P. C. 86. A sheriff, against whom an action for falsely returning that money deposited with him by a defendant in lieu of bail had been paid into court had been brought, was allowed to pay into court in the original action the money so deposited, though the plaintiff had been delayed two months through the sheriff's neglect. *Hall v. Jones*, 4 D. P. C. 712.

Liability of sheriff to attachment.

The sheriff is, moreover, liable to attachment for misconduct; accordingly if an arrest by the sheriff be a contempt of Court, an attachment may be issued against him. *Magnay v. Burt*, 5 Q. B. 381; and *Martin v. Francis*, 1 Chitt. Rep. 241. See, however, *Watson v. Carroll*, 7 D. P. C. 217.

But negligence in the execution of mesne process was no ground for an attachment against the sheriff. *R. v. Sheriff of Kent*, 2 M. & W. 316.

If after being served with a notice to return the writ, the

sheriff fails to do so within the thereby limited time, or, it seems, if he makes an insufficient return upon the face of it (Roll. Abr. "Return" (M) per Wats. Sher. 99; *Wilton v. Chambers*, 1 H. & W. 582), he will be in contempt and liable to attachment (see *Alchin v. Wells*, 5 T. R. 470), and see *Evans v. James*, 6 Scott, 354, where a writ and rule to return it were delivered to the sheriff at the same time.

Moreover, a plaintiff does not waive his right to an attachment against a sheriff for not duly returning a writ of *fieri facias* by directing him, after the expiration of the rule to return the writ, to proceed with the execution which had been suspended by an adverse claim. *Howitt v. Rickaby*, 9 M. & W. 52; 1 Dowl. N. S. 389. Per Parke, B., "In a case of this kind subsequent obedience to the rule to return a writ is no answer to an application for an attachment. The sheriff ought to have returned the writ at the expiration of the rule. The plaintiff wishing to assist him afterwards directs him to go on with the execution, but that is no waiver of his right to have an attachment. The attachment may be set aside on payment of costs."

In the case of a *fieri facias* issued in vacation, but returnable under a judge's order obtained in vacation on a day in term, a plaintiff must still pursue the old practice, and cannot bring the sheriff into contempt after the writ has been actually returned, although after the day on which it was returnable. *Williamson v. Harrison*, 9 M. & W. 225; 1 Dowl. N. S. 664.

As to attachment against a late sheriff, "A sheriff shall not be called upon to make a return of any writ after the expiration of six months from the date at which he ceases to hold his office." Sheriffs Act, 1887 (50 & 51 Vict. c. 55), sect. 28, sub-sect. 3.

Attachment
against an
ex-sheriff.

As to the costs which the sheriff will be ordered to pay on failure to make a return after rule, see *In re Heiron's Estate*, *Hall v. Ley*, 12 Ch. D. 795; 48 L. J. Ch. 688; and see *Evans v. Davies*, 7 Beav. 81; *R. v. Smithies*, 3 T. R. 351; and *Barnard v. Berger*, 1 N. R. 121. As to costs of attachment, see *post*, p. 503, and the provisions for costs in regard to offences under sect. 29 of the Sheriffs Act, 1887, *post*, p. 497.

Costs on
failure to
return after
rule.

Costs of at-
tachment.

By the Sheriffs Act, 1887, sect. 29, sub-sect. 1: "If a person being a sheriff, under-sheriff, bailiff, or officer of a sheriff, whether within a franchise or without, does any of the following things, that is to say—(a) conceals or procures the concealment of any felon, or (b) refuses to arrest any felon in his bailiwick, or

Punishment
of sheriff,
under-sheriff,
&c., for mis-
conduct, &c.

(c) lets go at large a prisoner who is not bailable, or (d) is guilty of an offence against, or breach of the provisions of, this Act, he shall (without prejudice to any other punishment under the provisions of this Act) be guilty of a misdemeanor, and be liable on conviction to imprisonment for a term not exceeding one year and to pay a fine, or if he has not wherewith to pay a fine, to imprisonment for a term not exceeding three years."

By sub-sect. 2, "If any person being either a sheriff, under-sheriff, bailiff, or officer of a sheriff, or being employed in levying or collecting debts due to the Crown by process of any court, or being an officer to whom the return or execution of writs belongs, does any of the following things, that is to say—(a) withholds a prisoner bailable after he has offered sufficient security, or (b) takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act [sending in an account containing items which were greatly reduced on taxation is not a 'taking or demand of money above the legal fees' within the section, the amount being subject to and in contemplation of taxation. *Trustee of Woolford's Estate v. Levy*, [1892] 1 Q. B. 772], or (c) grants a warrant for the execution of any writ before he has actually received that writ, or (d) is guilty of any offence against, or breach of the provisions of, this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior court, he and any person procuring the commission of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable (i) to be punished by the Court as hereinafter mentioned, and (ii) to forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved, and such forfeiture and damages may be recovered by such person as a debt by an action in her Majesty's High Court of Justice."

The penalty under this section of the Sheriffs Act, 1887, is inflicted for the doing of an act in the nature of a criminal offence. To constitute such an offence there must be a *mens rea*; therefore a sheriff's officer is not liable to the penalty if he makes an overcharge by mistake. In order to constitute the offence, it is not necessary that the improper demand or taking of money should be a condition precedent to the officer's doing his duty. *Lee v. Dangar, Grant & Co.* [1892] 1 Q. B. 231; affirmed by the Court of Appeal, W. N. (1892) 71; [1892] 2 Q. B. 337.

Moreover, an overcharge for poundage due to a clerical error made by a clerk is not an extortion for which a penalty may be recovered under the section. *Shoppes v. Nathan*, W. N. (1892) 2; [1892] 1 Q. B. 245. The liability is imposed by the section only upon the person actually guilty of the wrongful act. Therefore, where the sheriff's bailiff in executing a writ of *fi. fa.* has not excepted from seizure wearing apparel, bedding, tools and implements of trade to the value of 5*l.* as required by 8 & 9 Vict. c. 127, s. 8, the sheriff is not liable. *Bagge v. Whitehead*, C. A., [1892] 2 Q. B. 355.

By sub-sect. 3 of sect. 29, "Any of the following courts, that is to say, Her Majesty's High Court of Justice, any court of assize, oyer and terminer or gaol delivery, or any judge of any of the said courts, also where the alleged offence has been committed in relation to any writ issued out of any other court of record than those above mentioned, the court out of which such writ issued may, on complaint made of any such offence as aforesaid having been committed, and on proof on oath given by the examination of witnesses, or by affidavit, or on interrogatories of the commission of the alleged offence, and after hearing any thing which the alleged offender may urge in his defence (which evidence and hearing may be taken and had in a summary manner), punish the offender or cause proceedings to be taken for his punishment in like manner as a person guilty of contempt of the said Court may be punished."

By what Courts offender to be punished.

By sub-sect. 4, "The Court may order the costs of or occasioned by any such complaint to be paid by either party to the other, and an order by the High Court of Justice in any such summary proceeding to pay any costs, damages, or penalty shall be of the same effect as a judgment of the High Court, and may be enforced accordingly."

Court may make order as to costs of complaint.

By sub-sect. 5, "Any of the said courts being a superior court of record may also proceed for and deal with such offence in like manner as for any contempt of such court."

Superior courts of record may deal with offence as for contempt.

By sub-sect. 6, "If any person not being an under-sheriff, bailiff, or officer of a sheriff, assumes or pretends to act as such, or demands or takes any fee or reward under colour or pretext of such office, he shall be guilty of contempt of Her Majesty's High Court of Justice, and be liable to be punished in manner provided by this section, as if he were an under-sheriff guilty of a contempt of such court."

Penalty on person pretending to act as under-sheriff, &c.

Time within which proceedings against sheriff, &c. to be taken.

By sub-sect. 7, "Any proceeding in pursuance of this section against a sheriff, under-sheriff, or any other person to whom this section applies, shall be taken within two years after the alleged offence was committed and not subsequently, and if the proceeding is in a summary manner, shall be taken before the end of the sittings of the Court held next after the offence was committed and not subsequently."

Postponement, &c. of proceedings against offender.

By sub-sect. 8, "Nothing in this section shall render a person liable to be punished twice in respect of the same offence, but if any proceeding is taken against a person under this section for any offence the Court or judge may postpone or stay such proceeding and direct any other available proceeding to be taken for punishing such offence."

Prohibition of sale of offices.

By sect. 27 of the Sheriffs Act, 1887, "(1) A person shall not directly or indirectly by himself or by any person in trust for him or for his use buy, sell, let, or take to farm the office of under-sheriff, deputy-sheriff, bailiff, or any other office or place appertaining to the office of sheriff, nor contract for, promise or grant for any valuable consideration whatever any such office or place, nor give, promise, or receive any valuable consideration whatever for any such office or place. (2) Any person who acts in contravention of this section, not being an under-sheriff, deputy-sheriff, bailiff or officer of a sheriff, shall be liable to the same punishment as if he were an under-sheriff, deputy-sheriff, bailiff, or officer. (3) Provided that this section shall not prevent the sheriff or under-sheriff from demanding and taking the lawful fees and perquisites of the office of sheriff, or of any place or employment belonging thereto, nor from taking security for duly answering for the same, and shall not prevent any officer of a sheriff from accounting to the sheriff for the fees and perquisites received by him in respect of his office, nor from giving security so to account, and shall not prevent a sheriff from giving nor an officer from receiving a salary or remuneration for the execution of his office."

Evidence to connect Sheriff with Under-sheriff and Officers, and Evidence against and for Sheriffs.

Production of warrant.

In an action against the sheriff for the wrongful act of a bailiff, it is not enough, in order to affect the sheriff, to prove

him a general bailiff, and that he had given a bond of indemnity to the sheriff as such, together with proving the copy of the warrant under which he entered and seized the plaintiff's goods ; but the privity between such bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution directed by the sheriff to such bailiff, or at least by proving such notice to produce it, as will, in the case of non-production, let in secondary evidence of its contents. *Drake v. Sykes*, 7 T. R. 113 ; and see as to secondary evidence of the contents of warrant, *Minshall v. Lloyd*, 2 M. & W. 450 ; *Suter v. Burrell*, 2 H. & N. 867 ; 27 L. J. Ex. 193. And in an action against the sheriff whose officer had seized the goods of A. under a *fi. fa.* against B., it is sufficient to produce the warrant without producing the writ ; and it lies upon the sheriff to show that no such writ issued. *Gibbins v. Phillips*, 2 M. & R. 238 ; 7 B. & C. 529, 535, n.

Where a sheriff's officer proved that he had seized goods under a warrant on a *fi. fa.* which was brought to him by his man, who told him that he had obtained it from the sheriff's office, and the officer also stated that he knew the handwriting on the warrant, which he had subsequently lost, it was held that this was sufficient evidence to prove that the officer acted under the authority of the sheriff. *Moon v. Raphael*, 2 Scott, 489 ; 2 Bing. N. C. 310 ; 1 Hodges, 289 ; 7 C. & P. 115.

In an action against a sheriff's officer for an illegal arrest it is evidence against him that the warrant was directed to him. *Slack v. London (Sheriffs)*, 1 Esp. 42.

But whilst the regular way of connecting the sheriff with his officer, so as to make him responsible, is by the production of the warrant, any recognition by the sheriff that the officer acted under his authority will dispense with the necessity of producing it. *Jones v. Wood*, 3 Camp. 228. Moreover, in an action against a sheriff for removing goods without paying a year's rent in arrear, the plea of not guilty admits the seizure by the sheriff, and it is not necessary to produce the warrant in order to connect him with the officer. *Reid v. Poyntz*, 8 D. P. C. 410 ; 6 M. & W. 412.

When production of warrant dispensed with.

An indorsement upon the writ (returned and filed by the sheriff) of the name of the officer is not sufficient to make the sheriff responsible without proving that his name was written upon it by the authority or with the privity of the sheriff. The writ with the sheriff's return upon it is only evidence

Indorsement on writ.

against him to the extent of his duty under it. *Hill v. Middlesex (Sheriff)*, Holt, 217; 7 Taunt. 8; and see *Morgans v. Bridges*, 2 Stark. 314; 1 B. & A. 647; *Francis v. Neave*, 6 Moore, 120; 3 B. & B. 126; *Bessey v. Windham*, 6 Q. B. 166; 8 Jur. 824; 14 L. J., Q. B. 7; and *White v. Morris*, 11 C. B. 1015; 21 L. J., C. P. 185 (where *Bessey v. Windham*, *supra*, dissented from).

Where, in an action for an escape against the sheriff, the writ in the former action was produced to connect him with his officer, on which was indorsed "warrant to B.," who, on being called, stated that he had delivered the warrant to another who did not produce it, it was held, that it should have been left to the jury to say whether B. acted under the sheriff's authority, the indorsement being *prima facie* evidence that he did so act. *Fermor v. Phillips*, 5 Moore, 184, n.; 3 B. & B. 27, n.; Holt, 537. And in an action for an escape against the sheriff in *ca. sa.* the indorsement "*non est inventus*" upon the *ca. sa.* is sufficient evidence against him of the delivery of the *ca. sa.* *Blatch v. Archer*, 1 Cowp. 63.

Admissions by
under-sheriff,
officers, &c.

In an action against the sheriff, admissions by the under-sheriff are not evidence, unless they accompany some official act of the latter or tend to charge himself. *Snowball v. Goodricke*, 4 B. & Ad. 541.

Declarations made by an officer whilst in possession of goods after the return of a *fi. fa.* are evidence against the sheriff; and no new warrant is necessary after a *renditioni exponas* to connect the officer with the sheriff. *Jacobs v. Humphrey*, 2 C. & M. 413; 4 Tyr. 272.

In an action against the sheriff for a false return to a writ, what was said by the bailiff to whom the warrant under it was directed, when asked by the plaintiff's solicitor, before the return of the writ, why he did not execute it, is evidence against the sheriff. *North v. Middlesex (Sheriff)*, 1 Camp. 389.

A sheriff, who levies and pays over the money to one party where the goods are claimed by another, shall be presumed to be indemnified by the party to whom he pays the money, and the declarations of that party are admissible in an action against the sheriff by the other party. *Aldridge v. Ireland*, 3 Doug. 397; and see *Proctor v. Lainson*, 7 C. & P. 629.

Declarations made by a sheriff's officer whilst the party was in his custody may be given in evidence in an action for an escape against the sheriff. *Bowsher v. Wilts (Sheriff)*, 1 Camp.

391. Moreover, confession of an escape by the under-sheriff is evidence against the sheriff. *Yabsley v. Doble*, 1 Ld. Raym. 190.

And see under this head, *Crowder v. Long*, 8 B. & C. 598; *Raphael v. Goodman*, 8 Ad. & E. 565; *Barsham v. Bullock*, 10 Ad. & E. 23; 2 P. & D. 241; *Brickell v. Hulse*, 7 Ad. & E. 454; *George v. Perring*, 4 Esp. 63; *Percival v. Stamp*, 9 Ex. 167; 23 L. J., Ex. 25, and *Shepherd v. Wheble*, 8 C. & P. 534.

As to discovery against the sheriff, see the Rules of the Supreme Court, 1883, Ord. XXXI., r. 28.

Discovery
against
sheriff.

Procedure.

By the Rules of the Supreme Court, 1883, Ord. LII., r. 2, "No motion or application for rule *nisi* or order to show cause shall hereafter be made in any action or . . . for attachment or . . . against a sheriff to pay money levied under an execution." See in relation to this rule, *Delmar v. Freemantle*, 3 Ex. D. 237.

Restriction on
rules *nisi* and
orders to show
cause.

By rule 3, "Except where according to the practice existing at the time of the passing of the principal Act any order or rule might be made absolute *ex parte* in the first instance, and except where, notwithstanding rule 2, a motion or application may be made for an order to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or a judge, if satisfied that the delay caused by proceeding in the ordinary way, would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside."

When notice
of motion to
be given.

By rule 4, "Every notice of motion . . . for attachment . . . shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." See as to rules 3 and 4, the Annual Practice, 1894, pp. 928—932.

Grounds of
application
for attach-
ment to be
stated in
notice.

By rule 11, "No order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice from the person issuing the writ or obtaining the order for attachment or committal (if not repre-

Committal
of sheriff
for non-
compliance
with notice
to return
writ, &c.

sented by a solicitor), or by his solicitor, calling upon the sheriff to return such writ or to bring in the body within a given time, if not complied with, shall entitle such person to apply for an order for the committal of such sheriff." See on this rule, *Hall v. Ley*, 12 Ch. D. 795; 48 L. J. Ch. 688; 27 W. R. 750. According to the 14th Ed. Chitt. Archb., the sheriff may be similarly compelled to return an order to arrest under sect. 6 of the Debtors Act 1869 (32 & 33 Vict. c. 62).

Notice to
ex-sheriff
to bring in
the body.

By rule 12, "When any sheriff shall, before going out of office, arrest any defendant, and render return of *cepi corpus*, he may be called upon by a notice, as provided by the last preceding rule [11], to bring in the body within the time allowed by law, although he may be out of office before such notice is given."

Date of order,
when drawn
up.

Application
for leave
to issue
attachment.

And as to date of order when drawn up, see rule 13.

By the Rules of the Supreme Court, 1883, Ord. XLIV., r. 2, "No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is asked to be issued." "The application is by motion (Ord. LII., r. 3), or by summons in chambers (D. C. F. p. 395, Chitt. Forms, 473)." Annual Practice, 1894, p. 823, and see that work at pp. 823—826 on this rule. By the Crown Office Rules, 1886, r. 261, "An application for an attachment for contempt shall be by motion for an order *nisi* and the service of an order *nisi* for an attachment shall be personal"; and see remaining Crown Office Rules, 1886, relating to attachment for contempt.

An attachment against the sheriff for not bringing in the body can only be granted on an affidavit of service of the notice to bring in the body, and no evidence, however strong, that the sheriff had received the notice will supply the want of it. See *Harmer v. Tilt*, 2 Marsh. 251, and *Barnard v. Berger*, 1 N. R. 121. And it would seem that the application must be similarly supported in all cases of attachment against the sheriff for contempt. For form of affidavit, see Chitt. Forms, p. 414. In applying for an attachment against a sheriff for an insufficient return to a writ the return must be brought before the Court by an office copy verified by affidavit. *Wilton v. Chambers*, 1 H. & W. 582.

Attachments for a rescue must be made returnable at a general return though the original process was at a day certain. *R. v. Wilkins*, 1 Stra. 624.

An attachment against the sheriff is directed to the coroner. See as to lodging the writ with the coroner, the coroner's return and the caption of the sheriff, and generally as to attachment against the sheriff, and also as to attachment against a late sheriff, Short & Mellor's Practice of the Crown Office, at pages 407—409.

Attachment against sheriff to be directed to coroner.

As to costs of attachment, see *Abud v. Riches*, 2 Ch. D. 528, and *Tilney v. Stansfield*, 28 W. R. 582. "They should be included in the order for the issue of the writ, and when taxed are recoverable in the usual way." Annual Practice, 1894, p. 826.

Costs of attachment.

The Court will, as a general rule, allow an informal return to be amended and a consequent attachment against the sheriff to be set aside on his payment of the costs. *R. v. Sheriff of Kent*, 2 M. & W. 316; and see *R. v. Sheriff of Monmouth*, 1 Marsh. 344; and *Thorp v. Hook*, 1 D. P. C. 494 and 501.

Setting aside attachment.

Where the writ was lost and the sheriff notified this to the plaintiff and that defendant was in custody, the Court set aside an attachment against the sheriff for not returning the writ. *R. v. Sheriff of Kent*, 1 Marsh. 289. *Per Gibbs, L.C.J.*, "The sheriff had actually executed the writ and was desirous of returning it, but was prevented from so doing by its having been lost. He gave notice to the plaintiff of that circumstance and also that the defendant was in custody. The plaintiff might then have proceeded as if the sheriff had returned *copi corpus* and had actually brought in the body."

Irregularity in the proceedings is a ground for setting aside attachment. *In re Holt*, 11 Ch. D. 168.

Where, on an application to set aside an attachment issued against a sheriff for not returning a writ of *fieri facias*, it appeared that the writ was issued on the 2nd of August and that a levy on part of the amount of the defendant's debt was made on the following day, on the 4th of September the sheriff was ruled to return the writ in eight days, but on the 12th of the same month the defendant died, and the writ was not returned until the 1st of November, it was held that the plaintiff had lost nothing by the delay on the part of the sheriff and that the attachment might be set aside on payment of costs. *R. v. Sheriff of Essex*, 8 D. P. C. 5; and see *R. v. Sheriff of Devon*, 17 L. J. C. P. 116.

If, after a compromise by the parties, either party rule the sheriff to return the writ, the Court will discharge that rule with

costs to be paid by the party obtaining it. *Alchin v. Wells*, 5 T. R. 470. And according to Short & Mellor's Practice of the Crown Office, when a defendant seeks to set aside an attachment because of a subsequent compliance with a writ or order of Court, the motion should be made on payment of the prosecutor's costs; and see that work at p. 414 as to the procedure incident to setting aside an attachment.

And see as to setting aside attachment, *R. v. Sheriff (late) of Devon*, 1 B. & Ad. 159; *Heppel v. King*, 7 T. R. 370; *R. v. Sheriff (late) of Middlesex*, 4 East 604; *R. v. Sheriff of London*, 9 East 316; *Fowlds v. Mackintosh*, 1 H. Bl. 233; *R. v. Sheriff of London* in *Hollier v. Clark*, 2 B. & A. 192; and *R. v. Sheriff of Middlesex*, 15 M. & W. 146; 3 D. & L. 472.

Generally.

Generally.

For further information in regard to the sheriff's liability and proceedings against the sheriff, see under the various other branches of this work, as also Chitty's Archbold's Practice of the Queen's Bench, the current Annual Practice, and Short & Mellor's Practice of the Crown Office.

II. RIGHTS OF SHERIFF.

Rights of
sheriff.

This subject is fully treated under the other portions of this work, notably in relation to "Execution" generally, "Sheriff's Fees," and "Interpleader"; see also the above standard works for any further information thereon.

CHAPTER XXXI.

SHERIFFS' FEES, ETC.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20, sub-s. 1, "A sheriff shall be entitled in respect of all sums due to the Crown, and collected by him under process of any Court, to an allowance upon his accounts of one shilling and sixpence in the pound for every sum not exceeding one hundred pounds, and one shilling for every pound exceeding the first hundred pounds."

Fees on sums due to Crown collected by sheriff.

By sub-sect. 2, "Any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff, other than process for the recovery of the aforesaid sums due to the Crown, may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor, with the advice and consent of the judges of the Court of Appeal and High Court of Justice, or any three of them, and with the concurrence of the Treasury."

Fees for execution of process.

By sub-sect. 3, "Any sheriff or officer of a sheriff, and any officer arresting or having in custody any person by virtue of any action, writ, or attachment, shall not demand or take any reward to do his office, except such remuneration as is given to the sheriff by the Crown, or is given to an officer of the sheriff by the sheriff, and such fees and poundage as are above mentioned or are allowed by or in pursuance of any other Act, and, save as allowed by this Act, shall not demand or take directly or indirectly any reward for doing his office or duty or for abstaining therefrom, or in respect of the mode in which he does his office or duty."

Sheriff, &c., not to take any reward, except such as allowed by Crown, &c.

By sub-sect. 4, "Where a sheriff seizes any personal estate for any sum due to the Crown and dies or is superseded before he has sold the same and his successor sells the same, the poundage and fees due in respect of the seizure and sale shall be apportioned between the preceding and subsequent sheriffs in such manner and proportions as a judge of the High Court of Justice may on application determine, having regard to the expense and trouble that each sheriff had."

Apportionment of fees between sheriff and predecessor in office.

Table of Fees on Writs of Fieri Facias.

Fees on
execution
of writs of
fieri facias.

The following is the table of fees to be taken on execution of writs of *fieri facias* under order of the judges dated 31st August, 1888:—

1. For expenses incurred by the sheriff's officer in making inquiries as to the goods of an execution debtor, and as to claims for rent and other claims on the goods, the actual expenses not exceeding under any circumstances.....	£	s.	d.
2. For seizure by the sheriff's officer. For each building or place separately rated at which a seizure is made	1	1	0
3. For mileage: to include the mileage of the bailiff or the man in possession, per mile from the sheriff's officer's residence.....	0	1	0

The foregoing fees, numbered 1, 2, and 3, shall be paid by the execution creditor, and shall not be recoverable by him although the execution proves abortive.

4. For man in possession, per day	£0	5	0
To provide his own board in every case.			
5. For removal of goods or animals to a place of safe keeping, when necessary, the actual cost.			
6. When goods or animals are removed, for warehousing and taking charge of the same (including feeding of animals) $2\frac{1}{2}$ per cent. on the value of the goods or animals removed, or the sum endorsed on the writ of execution, whichever is the less. No fees for keeping possession of the goods or animals to be charged after the goods or animals have been removed.			
7. For the inventory and valuation, cataloguing, letting, and preparing for sale, when no sale takes place by reason of the execution being withdrawn, satisfied, or stopped, $2\frac{1}{2}$ per cent. on the value of the goods.			

[This does not, however, apply to the sale of a ship, *Cohen v. De Las Rivas*, 64 L. T. 661; 39 W. R. 539.]

8. For advertising and giving publicity to the sale by auction, the sum actually and necessarily paid.
9. For commission to the auctioneer on a sale by auction, $7\frac{1}{2}$ per cent. on the sum realized, not exceeding 100*l.*, 5 per cent. on the next 200*l.*, 4 per cent. on the next 200*l.*; and on any sum exceeding in all 500*l.*, 3 per cent. up to 1,000*l.*, and $2\frac{1}{2}$ per cent. on any sum exceeding 1,000*l.*
10. For any sale by private contract, half the percentage allowed on a sale by auction.
11. Sheriff's poundage and the fee for delivery of the writ to the under-sheriff shall be the same as before the making of this order.

The foregoing fees, numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, shall be levied in every case in which an execution is completed by sale, as fees payable to sheriffs were levied before the making of this order. In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be; and the amount of any costs and charges payable under this scale shall be taxed by a Master of the Supreme Court or District Registrar of the High Court (as the case may be), in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof.

The under-mentioned Acts, whereby a sheriff's remuneration was formerly regulated, are repealed by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55). Sect. 39, sub-sect. 5, of this Act, however, provides that, "Any fees or poundage authorized to be taken by or in pursuance of any enactment hereby repealed may continue to be taken until altered in pursuance of this Act." In view of this reservation and of the limited area dealt with by sect. 20 of the Act and the above order of the 31st August, 1888, such repeal would appear to be only to the extent of the modification effected by that section (20) and order, and in the same manner it would seem that the fees which a sheriff is entitled to take under 29 Eliz. c. 4 are not interfered with by the fees allowed under 7 Will. 4 & 1 Vict. c. 55 (*Davies v. Griffith*, 8 L. J. (N. S.) Ex. 70; 4 M. & W. 377; 7 D. P. C. 204), and the only effect of 7 Will. 4 & 1 Vict. c. 55 in relation to 29 Eliz. c. 4 was to exempt from the penalties of the latter Act the cases in which the sheriff should take no larger fees than allowed by order of the judges under 7 Will. 4 & 1 Vict. c. 55 (*Pilkington v. Cooke*, 16 M. & W. 615; 4 D. & L. 347; 17 L. J. Ex. 141; *S. P.*, *Wright v. Greenacre*, 10 Q. B. 1; 11 Jur. 408; 16 L. J. Q. B. 246). It will be, moreover, observed that by sect. 20, sub-sect. 3, of the Sheriffs Act, 1887, the sheriff's remuneration under prior Acts in the therein-mentioned cases is expressly maintained. It has accordingly been deemed advisable to set out the following statutory provisions for a sheriff's remuneration as so modified.

By 29 Eliz. c. 4, the following fees are authorized to be taken by sheriffs, under-sheriffs, &c., viz.:—For the serving and executing any extent or execution upon the body, lands, goods or chattels of any person or persons (this Act is not, however, to extend to any sheriff's fees to be taken within any city or town corporate (a)) twelpence in the pound where the

Fees or poundage authorized by certain Acts repealed may continue to be taken.

Fee for serving or executing an extent or execution on body, lands, &c.

(a) This reservation is not apparently recognized in practice.

amount levied, &c. or in respect whereof the body is taken is under one hundred pounds, and sixpence in the pound over and above the first one hundred pounds. 29 Eliz. c. 4 does not bind the Crown. *Lake v. Turner*, 4 Burr. 1981.

Fee for
levying debts,
&c., except
post fines.

By 3 Geo. 1, c. 15, s. 3, for levying any debts, duties, or sums of money whatsoever, except post fines, due or hereafter to become due to the King's Majesty, his heirs or successors, by process to them [the sheriffs] directed upon the summons of the pipe or green wax, or by *levari facias*, out of the Court of Exchequer, sheriffs shall have twelvepence in the pound where the amount levied or collected is under one hundred pounds, and sixpence in the pound over and above the first one hundred pounds (b).

Fee on process
by *fi. fa.* and
extent.

For levying all debts, duties, and sums of money, except post fines due or to become due to his Majesty, his heirs and successors, by process on *fi. fa.*, and extent, issuing out of any of the offices of the Court of Exchequer, provided the sheriff shall duly answer the same upon this account by the general sealing day of such term in which he ought to be dismissed the Court, or in such time to which he shall have a day granted to finish his said accounts, by warrant signed by the Lord Chief Baron, or one of the barons of the coif of the said Court and not otherwise, the sheriff shall be allowed one and sixpence in the pound where the amount levied or collected is under one hundred pounds, and twelvepence in the pound over and above the first one hundred pounds (b).

Fee for
executing
a *hab. fac.*
possess., &c.

By sect. 16 of the same Act, for ascertaining the fees for executing of writs of *elegit*, so far as the same relate to the extending of real estates, and for ascertaining the fees for executing of writs of *habere facias possessionem aut seisinam*, a sheriff, &c. shall only be entitled for executing of any writ or writs of *habere facias possessionem aut seisinam* the sum of twelvepence for every twenty shillings of the yearly value of any manor, messuage, lands, tenements, and hereditaments, whereof possession or seisin shall be by them or any of them given, where the whole exceedeth not the yearly value of one hundred pounds, and the sum of sixpence only for every twenty shillings per annum over and above the said yearly value of one hundred

(b) This provision is, it will be observed, replaced by that of sect. 20, sub-sect. 1 of the Sheriffs Act, 1887, *ante*, p. 505.

pounds. And see *Nash v. Allen*, 4 Q. B. 784; 12 L. J. Q. B. 298.

Table of Fees under 7 Will. 4 & 1 Vict. c. 55.

The following is a table of the fees to be taken by the sheriffs, under-sheriffs, deputy-sheriffs, sheriffs' agents, bailiffs, and others the officers or ministers of sheriffs, in England and Wales, pursuant to the statute 7 Will. 4 & 1 Vict. c. 55 (c). This table is set out with due regard to the apparent disuse now of bail bonds, and some of the other undermentioned process.

<i>For every Warrant which shall be granted by the Sheriff to his Officer upon any Writ or Process.</i>			Fees for warrants granted by sheriff to officer upon writ or process.		
	£	s.	d.		
In London and Middlesex.....	0	2	6		
And on Crown and outlawry process, an additional ..	0	2	6		
In all other counties where the most distant part of the county shall not exceed 100 miles from London	0	5	0		
Not exceeding 200 miles	0	6	0		
Exceeding 200 miles	0	7	0		
For an arrest in London	0	10	6		
In Middlesex, not exceeding a mile from the General Post Office	0	10	6		
Not exceeding seven miles from same place	1	1	0		
In other counties, not exceeding a mile from officer's residence	0	10	6		
Not exceeding seven miles	1	1	0		
Exceeding seven miles	1	11	6		
For conveying the defendant to gaol from the place of arrest, per mile	0	1	0		
For an undertaking to give a bail bond	0	10	6		

For a Bail Bond.

	Fees on bail bonds.		
If the debt shall not exceed £50	0	10	6
" " £100	1	1	0
" " £150	1	11	6
" " £300	2	2	0
" " £400	3	3	0
" " £500	4	4	0
If it shall exceed £500	5	5	0
For receiving money under the statute upon deposit for arrest, and paying the same into Court, if in London or Middlesex	0	6	8
If in any other county	0	10	0

(c) See 7 Will. 4 & 1 Vict. c. 55. Such part of this table as refers to process at the suit of the Crown is annulled by R. M. T., 10 Vict.

Fees for filing
bail bonds.*For Filing the Bail Bond.*

	£	s.	d.
If the arrest be made in London or Middlesex	0	2	0
If in any other county	0	4	0

Fees on
assignment
of bail or
other bonds.*Assignment of Bail or other Bond.*

If in London or Middlesex	0	5	0
If in any other county, including postage	0	7	6
For the return to any writ of <i>habeas corpus</i> , if one action	0	12	0
And for each action after the first	0	2	6
For the bailiff to conduct prisoner to gaol, <i>per diem</i> ..	0	10	0
And travelling expenses, per mile	0	1	0
For searching offices for detainers	0	1	0
Bailiff's messenger for that purpose	0	2	6
To the bailiffs for executing warrants on extent, <i>capias utlagatum, levare facias (d), ca. sa., ne exeat</i> , attachment, elegit, writ of possession, forfeited recognizance, process from pipe office, and other like matters, for each, if the distance from the sheriff's office or the bailiff's residence do not exceed five miles.....	1	1	0
If beyond that distance, per mile.....	0	0	6
On <i>distringas</i> , in London	0	5	0
In Middlesex, not exceeding five miles from General Post Office	0	5	0
Exceeding five miles	0	10	0
In other counties, not exceeding five miles from officer's residence	0	5	0
Exceeding five miles	0	10	0
For each man left in possession, when absolutely necessary—			
If boarded, <i>per diem</i>	0	3	6
If not boarded, <i>per diem</i>	0	5	0
For every sale by auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than £300, five per cent.; £400, four per cent.; £500, three per cent.; and where it exceeds £500, 2½ per cent.			
For the certificate of sale to save auction duty	0	2	6
Bond of indemnity, besides stamps	1	10	0
Certificate of execution having issued for record	0	5	0

Fees on writs
of trial and
inquiry.*On Writs of Trial and Inquiry.*

For a deputation.....	1	1	0
On lodging writ for entering cause and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial	0	4	0

(d) The words "*feri facias*" are omitted here by reason of the existing Table of Fees for the execution of writs of *feri facias* under Order of 31st August, 1888, *supra*, and the above Table must be accordingly regarded as solely applicable to the other cited proceedings.

<i>On Trial or Inquisition (e).</i>				Fees on trial or inquisition.
	£	s.	d.	
Sheriff for presiding	1	1	0	
Bailiff for summoning jury and attendance in Court..	0	4	0	
And if held at the office of the under-sheriff—				
For hire of room, if actually paid, not exceeding ..	0	10	0	
For travelling expenses of under-sheriff from his office to place where trial or inquisition held, <i>per</i> mile	0	1	0	
To the bailiff from his residence, <i>per</i> mile	0	0	6	
The travelling expenses of the under-sheriff from his office, and of the bailiff from his residence to the place where the trial or inquisition is held, are to be apportioned rateably to the parties, if more than one trial or inquisition be held at the same time and place.				
In all cases in which it shall appear to the master that a saving of expense has accrued to the parties by reason of writ of trial having been executed by deputation, the fee for such deputation shall be allowed.				
On writs of extent, <i>elegit</i> , <i>capias utlagatum</i> , and others of the like nature; for summoning the jury, use of room, presiding at the inquisition, &c.	2	2	0	
Jury	0	12	0	
For travelling expenses of under-sheriff from his office to the place of inquisition, <i>per</i> mile	0	1	0	
For drawing and engrossing the inquisition, <i>per</i> folio.	0	1	6	
For a summons for the attendance of a witness	0	5	0	

<i>In Replevin.</i>				Fees in replevin.
	£	s.	d.	
Bond upon the same scale as the bail bond.				
Precept to bailiff	0	2	6	
Notice for service on defendant	0	2	6	
Broker where the sum demanded and due shall exceed £20 and shall not exceed £50, for appraisement and affidavit of value	0	10	6	
Where it shall exceed £50	1	1	0	
And his travelling expenses from his residence to the place where the goods are, <i>per</i> mile	0	0	6	
Bailiff for summoning parties and delivering goods to tenant	1	1	0	
And his travelling expenses same as broker.				
For the warrant, record, and return of a <i>re. fa. lo.</i> , <i>accedas ad curiam pone</i> , or writ of false judgment..	0	16	6	
For writ of <i>retorno habendo</i>	0	4	6	
For each summons on a writ of <i>sci. fa.</i> , or for the service of writ of <i>capias</i> where no arrest.....	0	5	0	
And mileage <i>per</i> mile.....	0	1	0	
For recording each demand or proclamation under writs of outlawry	0	2	0	

(e) By arrangement with the parties, further allowances are often made when the inquiry occupies more than a day.

For bailiff for making each demand or proclamation on writs of outlawry in London and Middlesex	£ s. d. 0 2 6
In other counties	0 5 0
And travelling expenses, if the distance shall exceed five miles, then for every mile beyond that distance	0 0 6
For any <i>supersedeas</i> , writ of error, order, liberate, or discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county), or of goods taken in execution	0 4 6
For the return of any writ or process, and filing same, exclusive of the fee paid on filing	0 1 0
For any duty not herein provided for, such sum as one of the Masters of the Courts of Queen's Bench or Exchequer, or one of the prothonotaries of the Court of Common Pleas, may upon special applica- tion allow.	

Fees on
warrants
where several
defendants in
writ of *capias*.

Where there are several defendants in a writ of *capias*, and warrants are issued thereon by the under-sheriff against more than one defendant, no more shall be charged in any case for each warrant, after the first, than two shillings and sixpence.

Fees for
attendance in
Court.

By the Reg. Gen., Trin. Term, 1864, it is ordered that the following fees may be taken by sheriffs, or their officers, pursuant to the statute 7 Will. 4 & 1 Vict. c. 55, for attending in Court upon the trial:—

Of every common jury cause or issue, from the party who entered the same for trial the sum of	£ s. d. 0 10 6
Of every cause or issue tried by a special jury summoned by precept under the 108th section of the Common Law Procedure Act, 1852, from the party at whose instance the same was so tried, the sum of	1 1 0

Fees for
executing
order to
arrest.

With regard to order for arrest under the Debtors Act, 1869, by the Rules of the Supreme Court, 1883, Ord. LXIX. r. 2, "The sheriff or other officer executing the order shall be entitled to the same fees as heretofore."

Fees on view.

By the Crown Office Rules, 1886, r. 159, "Upon any application for a view there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the office of the under-sheriff, and the sum to be deposited with the under-sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed five miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the solicitor of the party who obtained

the view. If such sum shall not be sufficient to pay such expenses the deficiency shall forthwith be paid by such solicitor to the under-sheriff, and the under-sheriff shall pay and account for the money so deposited, according to the scale at the end of the Appendix to these Rules."

The following is the above-mentioned scale of costs of view in under-sheriff's account under rule 159 :—

	£	s.	d.
For travelling expenses to the under-sheriff, showers, and jurymen, expenses actually paid, if reasonable.			
Fee to the under-sheriff when distance does not exceed five miles from his office	1	1	0
Where such distance exceeds five miles	2	2	0
And in case he shall be necessarily absent more than one day, then for each day after the first a further fee of	1	1	0
Fee to each of the showers the same as the under-sheriff, calculating the distance from their respective places of abode.			
Fee to each of the common jurymen, <i>per diem</i>	0	5	0
Fee to each special jurymen, <i>per diem</i>	1	1	0
Allowance for refreshment to the under-sheriff, showers, and jurymen, whether common or special, each <i>per diem</i>	0	5	0
To the bailiff for summoning each jurymen whose residence is not more than five miles distance from the office of the under-sheriff	0	2	6
And for each whose residence does exceed five miles of such distance	0	5	0

The statutory fees applicable to assessment of damages and compensation appear to be both incomplete and inadequate for the work involved, to meet which it seems customary to make and allow supplemental charges. In this connection the following representative sets of sheriff's charges on assessment of damages under a writ of inquiry and on an assessment of compensation under the Lands Clauses Consolidation Act (f) will probably be of service.

Customary fees on assessment of damages under writ of inquiry, and compensation under Lands Clauses Consolidation Act.

Precedent of Sheriff's Charges on Assessment of Damages under Writ of Inquiry.

	£	s.	d.
Under-sheriff for presiding	1	1	0 (g)
Jury	0	12	0
Bailiff for summoning jury	0	4	0

(f) Prepared from material kindly furnished by two leading county under-sheriffs.

(g) The guinea for presiding would appear to be inadequate, for the inquiry might last a whole day. Such fee, doubtless, contemplated a Sheriff's Court where a number of inquiries would probably be held at the same time.

	£	s.	d.
Use of room (charge varies)	0	4	0
Mileage (if inquiry be held at a distance) 1s. per mile	0	4	0
Inquisition, 1s. 6d. per folio	0	4	0
Return	0	1	0

*Precedent of Sheriff's Charges on Assessment of Compensation
under the Lands Clauses Act.*

Special Jury.

	£	s.	d.
Notice of nominating jury to both parties and of holding inquisition to promoters	2	2	0
Nominating jury and sheriff's fee	2	2	0
Two copies of the list of 48 jurors	0	10	0
Reducing same and sheriff's fee	1	1	0
Two copies of the list as reduced	0	5	0
Making out 20 summonses and warrant to officer to summon jury	1	0	0
Officer's fee summoning jury	2	10	0
Under-sheriff's fee attending view	2	2	0
Jurors' fees on view	21	0	0
Travelling expenses	21	0	0
Under-sheriff's fee for presiding at inquiry, per day..	5	5	0
Jurors' fees on inquiry	21	0	0
Preparing inquisition, verdict, and judgment, en- grossing same on parchment, endorsing return on warrant and filing with clerk of the peace	3	3	0
Copy of the warrant to keep	0	5	0
Letters, telegrams, &c.	0	5	0

Common Jury.

Notice of nominating jury to both parties and of holding inquisition to promoters	2	2	0
Striking jury	2	2	0
Two copies of the list of jurors	0	5	0
Twenty-four summonses and warrant to officer to summon jury	1	4	0
Officer's fee summoning jury	1	4	0
Under-sheriff's fee attending view	2	2	0
Jurors' fees on view, at 5s. each	6	0	0
Travelling expenses	6	0	0
Under-sheriff's fee for holding inquiry, per day	5	5	0
Jurors' fees on inquiry	1	4	0
Preparing inquisition, verdict, and judgment, en- grossing same, endorsing return on warrant and filing with clerk of the peace	3	3	0
Copy of the warrant to keep	0	5	0
Letters, telegrams, &c.	0	5	0

The under-sheriff usually charges whatever sums are paid to the clerk of the peace, and for the use of the Court. The officer generally gets 1*l.* 1*s.* for the view, and 1*l.* 1*s.* per day for being present at the inquiry in charge of the jury.

A sheriff might levy under a *fi. fa.* the amount of his fees authorized by 7 Will. 4 & 1 Vict. c. 55, although not endorsed on the writ, and he need not particularise their respective amounts in his return. *Curtis v. Mayne*, 2 Dowl. N. S. 37. But if the sheriff sells under a *renditioni exponas*, he is not entitled to deduct anything, either for extra expenses or poundage, and he must make a return of the whole sum produced by the sale, when the Court will order it to be paid over, deducting poundage. *Rex v. Jones*, 1 Price, 205.

When sheriff
entitled to fees
and poundage,
under *fi. fa.* ;

To entitle the sheriff's officer to charge poundage and other fees under a writ of *fi. fa.* he must have made an actual seizure before tender of payment. *Nash v. Dickinson*, L. R. 2 C. P. 252; and see *Colls v. Coates*, 3 P. & D. 511; 11 A. & E. 826; *Mortimore v. Cragg*, 3 C. P. D. 216; 47 L. J. C. P. 348; and *Bissicks v. The Bath Colliery Co. Ltd.*, 3 Ex. D. 174; 47 L. J. Ex. 408. Moreover, when a sheriff makes a seizure in one place and subsequently has another writ of *fi. fa.* delivered to him for execution, he is not entitled to charge a fee or mileage for a second seizure under the second writ, unless there is in fact a fresh seizure in a different place. *In re Wells, ex parte Sheriff of Kent*, 68 L. T. 231.

But if the sheriff levies, he is entitled to poundage, though the parties compromise before he sells any of the goods. *Alchin v. Wells*, 5 T. R. 470. See, moreover, the table of Sheriff's Fees under the Order of 31st August, 1888, *ante*, p. 506.

The sheriff is entitled to retain his poundage though the execution is set aside for irregularity. *Bullen v. Ansley*, 6 Esp. 111. But a sheriff is not entitled to poundage where, after seizure and before sale, the judgment and all subsequent proceedings are set aside for irregularity. *Miles v. Harris*, 12 C. B. N. S. 550; 31 L. J. C. P. 361; 6 L. T. 649.

If a sheriff leaves goods taken in execution with a person who parts with the possession of them, he has no right to retake them merely to secure his own poundage, in a case where the execution was fraudulent. *Goode v. Langley*, 7 B. & C. 26. And where a sheriff sells goods which he has taken in execution wrongfully, it is a question for the jury to determine in their estimate of damages in each particular case whether or not he shall be allowed the expenses of the sale. *Clarke v. Nicholson*, 4 L. J. (N. S.) Ex. 66; 1 C. M. & R. 724; 5 Tyr. 233.

The sheriff is entitled to poundage on the sum he received under the execution only, and not on the amount claimed or

seized. *Rex v. Robinson*, 2 C. M. & R. 334; 4 D. P. C. 447; 1 Gale 209; 5 Tyr. 1095; and see *In re Purcell*, 13 L. R. Ir. 489. He is, however, entitled to poundage on the whole amount realized by his sale, although a portion of it is paid over to the landlord for rent. *Davies v. Edmonds*, 1 D. & L. 395; 12 M. & W. 31; 13 L. J. Ex. 1. In a case where the sheriff levied for a larger amount than that marked on the writ, and retained with the execution debtor's solicitor's assent poundage fees in respect of such larger amount, it was held that he was nevertheless only entitled to poundage fees on the amount marked on the writ. *Byrne v. Hutchison*, 9 Ir. R. C. L. 75; and see *Lyster v. Bromley*, Jones, W., 307; Cro. Car. 286.

under *elegit*; A sheriff is not entitled to poundage on a writ of *elegit* unless he has extended the land under the writ. Therefore, where a judgment creditor issued three writs of *elegit* on successive judgments, and the sheriff delivered to him possession of the lands under the first writ, it was held that the sheriff had no power to extend the land under the second and third writs and consequently was not entitled to poundage on these writs. *Carter v. Hughes*, 27 L. J. Ex. 225; 2 H. & N. 714; and see the judgment of Martin, B., in that case.

under extent; Where two extents issue into different counties, the sheriff who completes his levy is entitled to full poundage (*Rex v. Caldwell*, 1 Anst. 279; and see *Rex v. Barber*, 3 Anst. 717); though the debt is voluntarily paid to him. *Rex v. Fry*, 2 Anst. 358.

A sheriff has no right to levy costs or poundage, or any incidental expenses, under an extent on a simple contract debt. *Rex v. Tidmarsh*, 5 Price, 189.

If, on an extent issuing against the acceptors of bills for the purpose of levying a debt of the Crown, the drawers, after the execution of that process, take up and pay the bills, they are not liable to pay poundage on the levy. *Rex v. Freme*, 2 Price, 58.

And see as to sheriff's fees and poundage in Crown process, *Rex v. Villers*, 8 Price, 587; *Rex v. Bowles*, Wightw. 116; and *Rex v. Crackenthorp*, 2 Anst. 412.

under arrest
process.

A sheriff has no right to take poundage on the execution of a *ca. sa.* *Hayley v. Racket*, 5 M. & W. 620. And the sheriff is not entitled to his fees from a party who has been improperly arrested. *In re Thomas*, 4 L. J. (N. S.) Ch. 32.

The sheriff cannot be required to pay into Court money levied under an attachment, but he is not entitled to his poundage on the sum levied. *Rex v. Devon (Sheriff)*, 3 D. P. C. 10. In *Rex v. Palmer*, 2 East. 411, the Court directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money, there being no practice to warrant it.

A sheriff had formerly to apply to the Court for any extra allowance or expenses beyond his statutory remuneration (*Slater v. Staines*, 7 M. & W. 413; 9 D. P. C. 221; *Darics v. Edmonds*, 12 M. & W. 31; 31 L. J. Ex. 1; and *Rex v. Fereday*, 4 Price, 131), and it is conceived that in such a case an application to the Court for an allowance beyond the statutory remuneration is still necessary. Referring to the past decisions on this point, where a defendant against whom a *ca. sa.* issued, was confined to his bed, and too ill to be removed, the Court could afford the sheriff no relief for the extra costs incurred in keeping the custody, but enlarged the time for him to make his return. *Jones v. Robinson*, 2 Dowl. N. S. 1044; 11 M. & W. 758; 12 L. J. Ex. 415. And, in *Lane v. Sewell*, 1 Chit. 175, it was held that a sheriff will not be allowed extra expenses of summoning special jurors on account of their residing at a distance from each other; and that the Court will grant a rule absolute for the sheriff to refund the money received on this account, though he has actually expended it.

The sheriff may have an action upon a promise to pay his fees due by law. *Stanton v. Suliard*, Cro. Eliz. 654. See, moreover, the order of the 31st August, 1888, *ante*, p. 506, as to *fi. fa.*, which order would seem to vary the law as to solicitors' liability for sheriffs' *fi. fa.* fees under the former leading cases of *Maybury v. Mansfield*, 9 Q. B. 754; and *Royle v. Busby*, 6 Q. B. D. 171. A sheriff may, moreover, maintain an action for his fees for executing a *ca. sa.* against either the plaintiff or the defendant in the original action. *Bagot v. Malone*, 5 Ir. L. R. 454.

In a case where the execution creditor paid the expenses of a sale by appraisement of the goods sold under the *fi. fa.*, it was held that, in the absence of all proof of the circumstances under which such appraisement took place, he could not set off the amount so paid against the sheriff's demand for poundage. *Marshall v. Hicks*, 10 Q. B. 15; 16 L. J. Q. B. 134.

In an action by a sheriff for his poundage, proof that he has

Extra
allowances
and expenses.

Recovery of
fees by sheriff.

acted as sheriff is sufficient evidence of his being so, without proof of his appointment. *Bunbury v. Matthews*, 1 C. & K. 380.

Taxation of
sheriff's costs
and charges.

A taxation of sheriff's costs and charges by a Master of the Supreme Court or District Registrar of the High Court under the General Order as to fees of the 31st August, 1888, made in pursuance of the Sheriffs Act, 1887, is not the subject of review under the provision of Ord. LXV., r. 27 of the Rules of the Supreme Court, 1883. Such taxation is a mere calculation of amount, and *per se* fixes no liability on the person assessed. *Townend v. Yorkshire (Sheriff)*, 24 Q. B. D. 621; 59 L. J. Q. B. 156; 62 L. T. 402; 38 W. R. 381; 54 J. P. 598.

Recovery of
fees by
sheriff's
officer.

Where there is a special contract between the sheriff's officer and the execution creditor's solicitor, the sheriff's officer may sue the solicitor for his fees. *Foster v. Blakelock*, 5 B. & C. 328; *Walbank v. Quarterman*, 3 C. B. 94; *Ormerod v. Foskett*, 2 Peake 77; *Seal v. Hudson*, 4 D. & L. 760; and *Royle v. Busby*, 6 Q. B. D. 171. "There is no authority precisely in point as to the capability of a sheriff's officer to sue an execution creditor for his fees before the Sheriffs Act, 1887" (*per* Hawkins, J., in *Smith v. Broadbent*, 1 Q. B. D. 551), and no action could be maintained by the sheriff's officer against the execution creditor when there was a special contract with the solicitor. *Maile v. Mann*, 2 Ex. 608.

Moreover, a sheriff's officer cannot maintain an action against an execution creditor for his *fi. fa.* fees under the Sheriffs Act, 1887, and the order and schedule of fees made in accordance with sect. 20, sub-sect. 2 of that Act, but the sheriff alone can sue the execution creditor for them, and the sheriff must himself settle with his subordinates. *Smith v. Broadbent*, *ante*, and *per dictum* therein of Hawkins, J.

Remedies for
extortion.

In addition to the remedies for extortion given by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), sect. 29, sub-sect. 2, as to which see *ante*, p. 496, under the title "Liability and Rights of Sheriff, &c.," the party upon whom the extortion is committed has a remedy by action against the sheriff for money had and received. At common law an indictment may also be maintained, but only against the party actually guilty of the offence, and the sheriff, therefore, although liable to an action, is not liable to an indictment for the offence of his officer. If a sheriff's officer takes money *colore officii* for anything done in the course of his duty, and to which he is not entitled by law,

an action lies against the sheriff though there is no evidence that the money came to his hands. *Jones v. Perchard*, 2 Esp. 507.

The examined copy of a writ returned with the name of a sheriff's officer endorsed thereon, and proof that process was executed by an officer of that name, and that the practice of the sheriff's office is to endorse on the writ the name of the officer to whom the sheriff's warrant is delivered is sufficient to connect the sheriff with the acts of such officer and to render him liable in an action for extortion. *Scott v. Marshall*, 1 L. J. (N. S.) Ex. 97; 2 C. & J. 238; 2 Tyr. 257. And see under the title "Evidence to connect the Sheriff, &c.," *ante*, p. 498.

An under-sheriff cannot refuse to execute process till he has his fees; if he does, he may be indicted for extortion (*Hescott's Case*, 1 Salk. 330, and see *Bridge v. Cage*, Cro. Jac. 103); and an officer cannot detain for fees. *Mason v. Cutterson*, 1 Ld. Raym. 4.

If a sheriff's officer is guilty of extortion, the party complaining may call upon the sheriff to show cause why he should not refund the excess, and upon the officer to show cause why an attachment should not issue against him under the same rule. *Blake v. Newborn*, 2 B. C. R. 263; 5 D. & L. 601; 12 Jur. 882; 17 L. J. Q. B. 216, and see *Dew v. Parsons*, 2 B. & A. 562; 1 Chit. 295.

CHAPTER XXXII.

SHERIFFS' ACCOUNTS.

Transmission
of sheriffs'
accounts to,
and allowance
by, Treasury.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 21—
“(1) Every sheriff shall within two months after the expiration of his office, or in case of the death of any sheriff the under-sheriff by him appointed shall within two months next after the death of such sheriff, transmit to the Treasury a just and true account under his hand: (a) of all sums received by such sheriff, for the use of the Crown, and of all sums paid or claimed by him or on his behalf (including such sums as have been usually inserted in the bill of cravings (*a*)), with all such particulars as are needful to explain the same, and (b) of the names and residences of all persons incurring fines, issues, amerciaments, forfeited recognizances, or sums of money which he has been authorized to levy by virtue of any writ issued to him or to any predecessor in office, and if the same have not been levied, the causes of their not having been levied; and the Treasury may grant a warrant for the allowance of the sums so paid or claimed in the account, or for the payment of such sum of money in respect thereof as they may think reasonable: (2) Provided as follows—(a) a sheriff or under-sheriff shall not be imprisoned upon any process for not finishing his accounts in due time, or for any contempt or neglect in relation to his accounts, except by a warrant naming such sheriff or under-sheriff and specifying his offence, and issued by one of the judges of the High Court of Justice; (b) an under-sheriff shall not be personally responsible for any sum received by a deceased sheriff, but the same shall be answered by the representatives of the deceased sheriff or otherwise in due course of law; and (c) nothing in this section shall alter the right of any body corporate or person under any charter to receive any fines or other sums.”

Audit of
sheriffs'
accounts.

By sect. 22 of the same Act—“(1) All accounts of sheriffs and their under-sheriffs which are transmitted to the Treasury

(a) *i.e.*, the sheriff's claim.

under this Act shall be examined and audited by such persons and in such manner as the Treasury may from time to time by warrant direct; and the Treasury may by any warrant make such provisions in relation to the transmission, examination, verification, and audit of such accounts, and for ascertaining and determining the balances due from and the discharge of the persons accounting, as to the Treasury may seem proper.

(2) Every such warrant shall be laid before both Houses of Parliament within fourteen days after the making thereof if Parliament be sitting, and if Parliament be not sitting then within fourteen days after the next meeting of Parliament.

(3) If under any such warrant it is necessary for a sheriff or under-sheriff to take any oath to any account or any matter relating thereto, such oath, except when the Treasury require his personal examination before the person appointed by them to audit, may be sworn before any judge of Her Majesty's High Court of Justice, or before any Master of the Supreme Court of Judicature, or before any commissioner for taking oaths in the Supreme Court of Judicature, or before any justice of the peace.

(4) If any officer, clerk, or other person concerned in the passing of sheriff's accounts by his wilful act or default hinders any sheriff in passing his accounts, or obtaining his *quietus* (b), he shall make such satisfaction to the party aggrieved as may be ordered by Her Majesty's High Court of Justice or any judge thereof on complaint made in such summary manner as the said Court may order."

As to the usual allowances to sheriffs, the Treasury make certain fixed allowances which were settled by it in 1856 on the basis of the amounts generally allowed before that time. These allowances vary in different counties. All sums of money which have been reasonably and *bonâ fide* paid for the Crown in and about the execution of the office of sheriff constitute its essentials, and are allowed. By sect. 28 of 31 & 32 Vict. c. 125, it is provided that all expenses properly incurred by the sheriff in receiving the judge on the trial of an election petition and of providing him with necessary accommodation and with a proper court shall be defrayed by the Treasury.

The following is the usual mode of obtaining the sheriff's cravings:—At the termination of the sheriff's year of office his

Sheriffs' allowances and mode of obtaining same.

(b) *i. e.*, a document signed by the sheriffs' auditors showing what amount has been allowed.

under-sheriff obtains from his London agent the necessary forms for passing the bill of cravings, which forms the latter obtains from the Treasury. The bill of cravings is generally signed by the sheriff in duplicate, together with an authority from him to the Treasury to pay the amount of the cravings to the under-sheriff. It seems, however, to be customary in some counties for the bill of cravings to be signed by the under-sheriff. The under-sheriff fills up and signs the forms incident to the bill of cravings, and the papers are thereupon returned to the under-sheriff's London agent for his revision and passing of the accounts, generally through an expert. On the London agent obtaining the sheriff's "*quietus*," he forwards the same to the under-sheriff (c).

Generally speaking, the Treasury assize allowances are for advertising assizes, fitting up courts, &c. (*i. e.*, stationery, &c. for the judges), balloting box, judges' lodgings, summoning jurors, *nomina ministrorum* (*i. e.*, the names of the magistrates made out on parchment), as also an allowance to the high sheriff, his under-sheriff, and the latter's clerk for their respective attendance at the third or special assize, but for such assize only. This allowance is apparently not made to Irish high sheriffs. There is moreover a fixed daily allowance made to the high sheriff for his carriage (if hired), javelin men, trumpeters, advertising assizes, fitting up courts, &c., and summoning jurors for the special assize.

The sheriffs of metropolitan counties who attend the Central Criminal Court are allowed a fixed sum for their attendance. The sheriffs of Essex, Kent and Surrey are bound to attend.

If the jury are detained all night, the Treasury allow the expenses for their keep, or if the judge orders refreshments for a jury, which he is in the habit of doing when they are locked up, the costs of such refreshments are allowed by the Treasury.

Vouchers are required for all disbursements with the exception of those for the balloting box and for summoning jurors.

(c) In the case of the City of London, it is the duty of the Secondary to attend before the Queen's Remembrancer on the 31st October in each year to render the accounts of the City of London, and to give such assistance as may be necessary in passing the same.

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